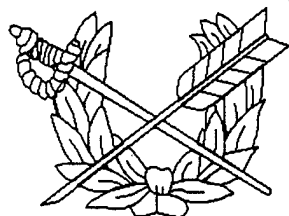


# FEDERAL TORT CLAIMS ACT



**JA 241**

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**JA 241**

**FEDERAL TORT CLAIMS ACT**

**PREFACE**

This casebook is a compilation of cases and materials on the Federal Tort Claims Act designed to provide source material for students at The Judge Advocate General's School. These materials are not official Department of the Army policy. The organization and development of legal materials are the work product of members of The Judge Advocate General's School faculty and do not necessarily reflect the views of The Judge Advocate General or any governmental agency.



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## **CHAPTER I. HISTORY AND PURPOSE OF THE FEDERAL TORT CLAIMS ACT (FTCA)**

The Federal Tort Claims Act is the product of an over thirty year debate regarding the responsibility of the United States to victims of its torts.<sup>1</sup> This debate resulted in a limited waiver of sovereign immunity for tort liability.<sup>2</sup> By allowing claims against the government, the FTCA eliminated thousands of requests to Congress for private legislative relief arising out of government torts. Chapter 4 of Army Regulation 27-20<sup>3</sup> implements the FTCA for the Department of the Army.

Under the FTCA, the United States is liable for the acts of its employees "in the same manner and to the same extent as a private individual under like circumstances."<sup>4</sup> Subject to certain exceptions and limitations, the FTCA provides for (a) the payment of money damages, for (b) injury or loss of either real or personal property or for personal injury or death, (c) caused by a wrongful or negligent act or omission, (d) of an employee of the United States, (e) acting within the scope of employment, (f) where the United States, if a private person, would be liable, (g) according to the law of the place where the act or omission occurred.

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<sup>1</sup> See generally L. JAYSON, HANDLING FEDERAL TORT CLAIMS, §§ 2.01-2.14, (1998).

<sup>2</sup> The FTCA appears at 28 U.S.C. §§ 2671-2680 (1994). The grant of jurisdiction to the federal courts appears at 28 U.S.C. § 1346(b) (1994).

<sup>3</sup> DEP'T OF ARMY REG. 27-20, LEGAL SERVICES: CLAIMS (31 December 1997) [hereinafter AR 27-20].

<sup>4</sup> 28 U.S.C. § 2674 (1994).



Two factors distinguish the FTCA from other governmental claims acts. First, there is no dollar limitation on liability. Multi-million dollar judgments have been obtained against the United States.<sup>5</sup> Second, the FTCA provides an administrative and a judicial remedy. A claimant must first present a claim to the federal agency whose activities gave rise to the injuries and allow the agency an opportunity to settle the claim.<sup>6</sup> If the agency denies the claim, takes no action on the claim, or offers an amount that is unsatisfactory, the claimant may bring suit against the United States in a federal district court.<sup>7</sup>

The FTCA is the most comprehensive waiver of the government's tort immunity on the books, but it is a limited waiver of sovereign immunity. The FTCA allows suits only for certain types of tort actions; negligently inflicted injuries are generally actionable while most intentional torts are not.<sup>8</sup> Further, unlike most state tort actions, punitive

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<sup>5</sup> See, e.g., *Elliott v. United States*, 13 F.3d 1555 (11th Cir. 1994), *vacated, reh'g en banc granted*, 28 F.3d 1076 (11th Cir. 1994) (\$14 million); *Reilly v. United States*, 665 F. Supp. 976 (D.R.I. 1987) (\$11 million), *modified*, 863 F.2d 149 (1st Cir. 1988); *Hull by Hull v. United States*, 971 F.2d 1499 (10th Cir. 1992), *cert. denied*, 507 U.S. 1030 (1993) (8.1 million); *Murphy v. United States*, 833 F. Supp. 1199 (E.D. Va. 1993), *aff'd*, 836 F. Supp. 350 (E.D. Va. 1993) (3.5 million); *Phillips v. United States*, 801 F. Supp. 337 (D. Idaho 1992), *aff'd*, 15 F.3d 1088 (9th Cir. 1994) (7.7 million).

<sup>6</sup> 28 U.S.C. § 2675 (1994).

<sup>7</sup> After the agency has had the claim for six months and has failed to settle or deny it, the claimant may, at his option, deem the claim denied and file suit in federal court. 28 U.S.C. § 2675(a) (1994). If the agency notifies the claimant by certified or registered mail of its decision to deny the claim, the claimant must file suit within six months of the date of mailing of the letter or the action will be forever barred. 28 U.S.C. § 2401(b) (1994); 28 C.F.R. § 14.9(b) (1996); *Lambert v. United States*, 44 F.3d 296 (5th Cir. 1995); *Taumby v. United States*, 902 F.2d 1362 (8th Cir. 1990), *vacated*, 919 F.2d 69 (8th Cir. 1990); *Parker v. United States*, 935 F.2d 176 (9th Cir. 1991).

<sup>8</sup> 28 U.S.C. § 2680(h) (1994). Not all intentional torts are barred, however. See, e.g., *Truman v. United States*, 26 F.3d 592 (5th Cir. 1994) (intentional infliction of emotional distress not barred). See also *Santiago-Ramirez v. Secretary of Dep't of Defense*, 984 F.2d 16 (1st Cir. 1993), *aff'd*, 62 F.3d 445 (1st Cir. 1995); *Kohn v. United States*, 680 F.2d 922, (2d Cir. 1982); *Gross v. United States*, 676 F.2d 295 (8th Cir. 1982); *Sheehan v. United States*, 896 F.2d 1168 (9th Cir. 1990), *modified*, 917 F.2d 424 (9th Cir. 1990).

damages and prejudgment interest are not recoverable from the United States under the FTCA.<sup>9</sup> Additionally, FTCA lawsuits are tried in federal district court without a jury<sup>10</sup> rather than before a jury as provided at common law and embodied in the Seventh Amendment.<sup>11</sup>

The requirement to file an administrative claim is a jurisdictional prerequisite to suit under the FTCA; the claimant must file the administrative claim with the agency and allow the agency at least six months to adjudicate the claim before filing a lawsuit against the United States.<sup>12</sup> Upon filing the lawsuit, the plaintiff's *ad damnum* is limited to the amount claimed administratively unless there is proof of newly discovered evidence or intervening facts relating to the amount of the claim.<sup>13</sup> While the substantive law of the place where the act or omission occurred governs the liability of the United States,<sup>14</sup> the FTCA has its own statute of limitations.<sup>15</sup> Special venue provisions also dictate where

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<sup>9</sup> 28 U.S.C. § 2674 (1994).

<sup>10</sup> 28 U.S.C. § 2402 (1994).

<sup>11</sup> U.S. CONST. amend. VII.

<sup>12</sup> 28 U.S.C. § 2675(a) (1994). *See* McNeil v. United States, 508 U.S. 106 (1993) (holding that a district court lacks jurisdiction over a lawsuit filed before proper filing of an administrative claim under the FTCA).

<sup>13</sup> 28 U.S.C. § 2675(b) (1994). *See, e.g.,* Corte-Real v. United States, 949 F.2d 484 (1st Cir. 1991) (limiting damages in lawsuit to \$100,000 when administrative claim requested "approximately \$100,000."); Cole v. United States, 861 F.2d 1261 (11th Cir. 1988) (allowing a substantial increase in damages sought based on an unexpected increase in the severity of the injuries).

<sup>14</sup> 28 U.S.C. § 1346(b) (1994).

<sup>15</sup> 28 U.S.C. § 2401(b) (1994).

the action may be brought.<sup>16</sup> Attorney fees are limited by the FTCA to 20% of an administrative settlement and to 25% of a judgment or compromise settlement.<sup>17</sup>

This text will briefly review the essential aspects of the FTCA as they relate to the military.

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<sup>16</sup> 28 U.S.C. § 1402(b) (1994).

<sup>17</sup> 28 U.S.C. § 2678 (1994).

## **CHAPTER II. THE ADMINISTRATIVE CLAIM REQUIREMENT**

### **A. GENERAL**

It is important to remember that the waiver of the United States' sovereign immunity is a matter of congressional grace. Since Congress has the power to repeal the entire FTCA, it clearly has the power to place lesser limitations on the right to sue the United States.

Substantial litigation has resulted from noncompliance with the requirements for the filing of an administrative claim. The federal courts generally treat these requirements as jurisdictional prerequisites to suit; failure to comply with the administrative claim requirement will bar an otherwise meritorious suit.<sup>1</sup>

A claimant's first requirement is to submit an administrative claim. The Attorney General's regulations implementing the FTCA require a claimant to file an administrative claim<sup>2</sup> with the "agency whose activities gave rise to the claim."<sup>3</sup> This is an absolute

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<sup>1</sup> *McNeil v. United States*, 508 U.S. 106 (1993) (a district court lacks jurisdiction over a lawsuit filed before proper filing of an administrative claim under the FTCA); *Montoya v. United States*, 841 F.2d 102 (5th Cir. 1988); *Burns v. United States*, 764 F.2d 722 (9th Cir. 1985); *Bialowas v. United States*, 443 F.2d 1047 (3d Cir. 1971).

<sup>2</sup> 28 U.S.C. § 2675 (1994).

<sup>3</sup> 28 C.F.R. § 14.2(b)(1) (1996).

condition precedent to filing suit.<sup>4</sup> The government can settle claims faster and less expensively through administrative processing than through litigation.

Local claims offices process the majority of the Army's administrative claims. The U.S. Army Claims Service provides technical supervision and support. Most local Army claims authorities have the power to compromise claims<sup>5</sup> based on factors such as the merits of the claim, trial risks, witness credibility, and the precedential value of settlement.

## **B. THE WRITTEN CLAIM**

The administrative process begins when the claimant files his or her administrative claim with the government agency allegedly responsible for the injury or damage suffered. In the Army, this is often the claims section of the staff judge advocate's office; however, any office of the agency is sufficient.<sup>6</sup> "Claim" is a term of art. For purposes of the FTCA, a "claim" is a written demand for the payment of a specified sum of money that is signed by the claimant or a duly authorized agent or

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<sup>4</sup> *Pipkin v. U.S. Postal Service*, 951 F.2d 272 (10th Cir. 1991) (a civil service grievance was not an FTCA claim); *Verner v. United States*, 804 F. Supp. 381 (D. D.C. 1992) (a veteran's request for benefits cannot be construed to be an FTCA claim).

<sup>5</sup> 28 U.S.C. § 2672 (1994). See AR 27-20, para. 4-6 for specific delegations of authority. The Department of Justice must approve settlements in excess of \$25,000.

<sup>6</sup> *Owens v. United States*, 531 F. Supp. 532 (N.D. Ga. 1982); *Frey v. Woodard*, 481 F. Supp 1152 (E.D. Pa. 1979).

representative.<sup>7</sup> The use of Standard Form 95 (SF95) is preferred, but any writing satisfies the statutory requirement if it contains a demand for payment of a specific sum and is signed by the claimant.

### C. SUM CERTAIN

The failure to state damages in a “sum certain” has invalidated many claims. In many cases, the claimant or the claimant’s representative decide, for a variety of reasons, to leave the dollar amount unspecified. Courts, however, have enforced the requirement that some specific amount be demanded.<sup>8</sup> Some claims are submitted by letter or SF95 with no sum certain but are accompanied by bills or receipts. Some courts have upheld this practice, but limited the claimant’s recovery to the amounts stated in such bills or receipts.<sup>9</sup> In other cases, claimants estimate approximate damages. In *Corte-Real v.*

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<sup>7</sup> 28 U.S.C. §§ 2401 and 2675(b) (1994); 28 C.F.R. § 14.2(a) (1996). *See, e.g.,* Santiago-Ramirez v. Secretary of Dept. of Defense, 984 F.2d 16 (1st Cir. 1993) (letter to AAFES Director of Administration complaining of dismissal and harassment and demanding \$50,000 constitutes proper FTCA claim).

<sup>8</sup> Suarez v. United States, 22 F.3d 1064 (11th Cir. 1994) (“unliquidated” in damages block of SF95 does not satisfy sum certain requirement); Bradley v. United States by Veterans Admin., 951 F.2d 268 (10th Cir. 1991) (demand “in excess of \$100,000” does not meet requirement for sum certain); Montoya v. United States, 841 F.2d 102 (5th Cir. 1988); Burns v. United States, 764 F.2d 722 (9th Cir. 1985); Allen v. United States, 517 F.2d 1328 (6th Cir. 1975); Molinar v. United States, 515 F.2d 246 (5th Cir. 1975); Melo v. United States, 505 F.2d 1026 (8th Cir. 1974); Caton v. United States, 495 F.2d 635 (9th Cir. 1974); Bialowas v. United States, 443 F.2d 1047 (3d Cir. 1971). *Contra* Collins v. United States, 626 F. Supp. 536 (W.D. Pa. 1985).

<sup>9</sup> Mack v. United States, 414 F. Supp. 504 (E.D. Mich. 1976); Molinar v. United States, 515 F.2d 246 (5th Cir. 1975). *Contra* Schaeffer v. Hills, 416 F. Supp. 428 (S.D. Ohio 1976).

*United States*,<sup>10</sup> “approximately \$100,000.00” was held to be a sum certain, but recovery was limited to \$100,000.00.

The “sum certain” requirement serves two governmental purposes. First, it may dictate the claims approval and denial authority, which is based on the dollar amount of the claim. Second, the dollar amount will provide a ceiling on the damages recoverable in a lawsuit.<sup>11</sup> Plaintiffs may recover an amount greater than that demanded in the administrative claim only upon a showing of “newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts relating to the amount of the claim.”<sup>12</sup>

Occasionally, a claimant will fail to provide information that is necessary for the agency to investigate or properly evaluate the claim. Claimants may be required to submit evidence and other information to substantiate their claims.<sup>13</sup> Failure to document or substantiate a claim may invalidate an otherwise valid claim.<sup>14</sup> As the following case

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<sup>10</sup> 949 F.2d 484 (1st Cir. 1991).

<sup>11</sup> 28 U.S.C. § 2675(b) (1994).

<sup>12</sup> *Id.* See generally *Spivey v. United States*, 912 F.2d 80 (4th Cir. 1990) (claimant’s tardive dyskensia could not have been discovered before filing, therefore, upward adjustment permitted); *Cole v. United States*, 861 F.2d 1261 (11th Cir. 1988); *Low v. United States*, 795 F.2d 466 (5th Cir. 1986); *Molinar v. United States*, 525 F.2d 246 (5th Cir. 1975); *Ianni v. United States*, 457 F.2d 804 (6th Cir. 1972); *Avril v. United States*, 461 F.2d 1090 (9th Cir. 1972); *Schwartz v. United States*, 446 F.2d 1380 (3d Cir. 1971).

<sup>13</sup> 28 C.F.R. § 14.4 (1996).

<sup>14</sup> *Cook v. United States*, 978 F.2d 164 (5th Cir. 1992) (to constitute a proper claim, sufficient information must be submitted to permit investigation); *Swift v. United States*, 614 F.2d 812 (1st Cir. 1980); *State Farm Ins. Co. v. United States*, 446 F. Supp. 191 (C.D. Cal. 1978); *Rothman v. United States*, 434 F. Supp. 13 (C.D. Cal. 1977); *Mudlo v. United States*, 423 F. Supp. 1373 (W.D. Pa. 1976); *Kornbluth v. Savannah*, 398 F. Supp. 1266 (E.D.N.Y. 1975).

illustrates, however, courts are generally unsympathetic to agency demands for additional substantiation when the claimant has complied with the statutory requirements.<sup>15</sup>

**Adams v. United States**

**615 F.2d 284 (5th Cir. 1980)**

**I.**

Jason Lee Adams was born at Eglin Air Force Base on July 25, 1976. Within 24 hours of his birth, the Air Force arranged for the child to be sent to Sacred Heart Hospital in Pensacola, Florida, for special treatment and evaluation. The Air Force then had him returned for care at Eglin.

The test results disclosed that the child had cerebral palsy secondary to hypoxic encephalopathy with spastic quadriplegia and microcephaly. The evaluation indicated that the child's condition was caused by brain damage resulting from a lack of oxygen to the brain, and that the child's prognosis was very poor. It is unlikely that his condition will ever improve or that he will have a very meaningful life. Jason will always require total care.

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<sup>15</sup> Kokaras v. United States, 980 F.2d 20 (1st Cir. 1992), *cert. denied*, 501 U.S. 819 (1993); GAF Corp. v. United States, 818 F.2d 901 (D.C. Cir. 1987); Charlton v. United States, 743 F.2d 557 (7th Cir. 1984); Warren v. United States Dep't of Interior, Bureau of Land Management, 724 F.2d 776 (9th Cir. 1984); Avery v. United States, 680 F.2d 608 (9th Cir. 1982); Tucker v. U.S. Postal Service, 676 F.2d 954 (3d Cir. 1982); Douglas v. United States, 658 F.2d 445 (6th Cir. 1981); Adams v. United States, 615 F.2d 284, *aff'd on rehearing*, 622 F.2d 197 (5th Cir. 1980).



Gary L. Adams and Deborah A. Adams filed a claim with the Air Force against the United States on behalf of themselves and their son Jason pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671-80. They alleged that the Air Force physicians who delivered Jason and provided Mrs. Adams with prenatal care negligently caused Jason to suffer permanent brain damage. In accordance with 28 C.F.R. § 14.2, the Adams submitted their claim on a completed Standard Form 95 to an Air Force claims officer at Eglin Air Force Base, Florida. Their claim, which alleged improper medical care by the Air Force, was filed on March 23, 1978, by their attorney, and was not answered within the six-month administrative review period.

The claims officer responded on March 31, requesting, under the authority of 28 C.F.R. § 14.4(b), written reports by any attending physicians who were not government employees, itemized bills and expenses, a statement of future expenses, and a signed medical authorization. The Adams' attorney wrote the claims officer on April 12, stating, "In my opinion, you have at your disposal all the necessary records to properly evaluate this claim." He added:

We will fully develop this claim with respect to the private physicians and the necessary future expenses, and when you have had an opportunity to fully investigate everything

at your disposal, we will be more than happy to exchange information in full.

In an April 18 letter, the claims officer stated that the requested information was "necessary to evaluate this claim and [was] required by this agency." He added that Jason had been transferred to Sacred Heart without a diagnosis; the Air Force physicians had been unable to determine the cause of the child's problems. The claims officer also stated:

I assume that from your conversations with me you do not evaluate cases without having all the facts and also would not expect us to evaluate this case without having all the facts. In addition, your failure to cooperate and supply us with the necessary information could result in a denial of your claim on that basis and prejudice your rights to proceed in federal court.

On June 12, appellants replied, "I hope you understand that we are in no way refusing to cooperate with your office and will furnish to you all of the items requested in your earlier letters as soon as we have received them ourselves." The Adams' executed medical authorizations were forwarded to the claims officer on July 5.

The claims officer wrote on July 19, asking that x-rays picked up by Mrs. Adams be returned as soon as possible "in order for me to complete the investigation of this claim." Responding on July 24, the Adams offered to return the x-rays, if the Air Force would promise to return them within ten days after receipt. On July 26, the claims officer insisted on the return of the x-rays, emphasizing that they were crucial to the evaluation of the claim and that without them the claim's merits could not be determined. They were returned on August 15.

In an affidavit dated November 14, the Adams' attorney stated that prior to filing the administrative claim, he had discussed Jason's condition with Air Force pediatrician Dr. Harlan W. Sindell. He stated further that he was told that Dr. Sindell had the "benefit of the medical information" obtained by Sacred Heart. Dr. Sindell's affidavit denies the fact. The claims officer's affidavit states that he never received this information or damage information. In short, there is a factual controversy as to what information was available to Air Force physicians. The Adams' attorney contends that he read the claims officer's letters as narrowing his requests, whereas the claims officer contends that his requests were cumulative.

After more than six months had passed without the settlement of their claim, the Adams brought this action in federal district court. They alleged that Jason's severe and permanent disabilities resulted from the negligent prenatal and delivery care provided by Air Force physicians. The district court found that the Adams had failed to make a proper claim

with the Air Force. The court held that, even if the Air Force had the information needed to process their claim, the Adams were obligated both to state that they had not incurred any medical expenses of which the Air Force was not informed and to provide the Air Force with information regarding necessary future medical expenses. On this basis, their action was dismissed. The court did not reach the statute of limitations issue raised by the United States.

## II.

Title 28 U.S.C. § 2765(a) establishes that as a prerequisite to maintaining a suit against the United States under 28 U.S.C. § 1346(b) a plaintiff must present notice of his or her claim to the appropriate federal agency. *Mack v. Alexander*, 575 F.2d 488,489 (5th Cir. 1978). Only after the claim has been denied or six months have passed may a plaintiff bring suit in federal court on the claim. 28 U.S.C. § 2675(a).

Under 28 U.S.C. § 2672, administrative agencies may settle claims presented to them. The Department of Justice promulgated 28 C.F.R. §§ 14.1-14.11 pursuant to section 2672. These regulations describe the settlement procedures to be followed by agencies and claimants.

The parties to this appeal dispute whether the Adams gave the Air Force sufficient notice to enable them to maintain this action. The United States argues that the Adams failed to provide the Air Force Claims Officer with all of the information that he requested as necessary to evaluate their claims. Specifically, the Adams failed to comply with the

28 C.F.R. § 14.4(b) requirement that claimants provide the Air Force with written reports by nongovernmental attending physicians, with itemized bills and expenses, and with a statement of expected future medical expenses. The United States asserts, therefore, that because, in presenting the administrative claim, the Adams did not comply with the regulations governing the elements of a proper claim, 28 C.F.R. §§ 14.1-14.11, the district court properly dismissed their action. The Adams contend that their failure to submit this information resulted from a mutual misunderstanding, which does not warrant dismissal of their suit, and that, in any event, the Air Force did not need the information to evaluate their claim because it already possessed the information.

The Air Force, therefore, basically argues that the Adams' failure to comply with 28 C.F.R. § 14.4(b) denies them the jurisdiction of a federal court. It is apparently of no consequence that the Air Force already possessed, or had access to, most of the information demanded, such as pertinent medical records and itemized bills or expenses. All relevant medical records were prepared by either the Air Force's own physicians or by the physicians of Sacred Heart Hospital, where the Air Force's doctors arranged for various tests to be run on Jason Adams. Likewise the Air Force, which covered all expenses for the child's care, had access to itemized bills and expenses. The record does not indicate that the Adams' past medical expenses included any expense not covered by these bills. According to the Air Force, the inefficiency and inequity of demanding

that a claimant produce information already in the Air Force's possession are immaterial. Section 14.2, it assumes, draws a line between an agency's claims officer and its personnel who allegedly negligently caused a particular injury. It is also apparently of no consequence that the remaining information sought by the Air Force was inherently speculative. Even when, as here, future medical expenses are exceedingly difficult to ascertain, the Air Force believes that it may condition federal court jurisdiction on the ability of claimants in a medical malpractice case to provide a definite statement of expected future medical expenses. In other words, claimants may be required to prepare the government's case or to prove their cases to a government claims officer before trial.

### **III.**

The argument of the Air Force fails for two reasons. First, it erroneously assumes that the notice requirements of 28 U.S.C. § 2675 must be read in light of the settlement procedures established by 28 C.F.R. §§ 14.1-14.11, which were promulgated pursuant to section 2672. Such a reading clearly contravenes congressional intent. The question whether a plaintiff has presented the requisite section 2675 notice is determined without reference to whether that plaintiff has complied with all settlement related requests for information. Second, even assuming that the Air Force correctly contends that section 2675 must be construed in light of section 2672 and 28 C.F.R. §§14.1-14.11, the Adams would not be barred from bringing their claim in federal court. To the extent that those

regulations attempt to define section 2675 notice, they do so in section 14.2. The parties agree, however, that section 14.2 has been satisfied; the Adams have merely failed to comply with section 14.4(b). On either basis, therefore, the Air Force's position must be rejected.

#### IV.

Congress' intent in enacting section 2675 is frustrated when the distinct functions of presenting notice and of engaging in settlement are confused in a way that impermissibly redefines the section 2675 notice requirement. The Air Force's argument confuses these two functions.

The relevant legislative history indicates two congressional purposes in requiring claimants to provide the relevant agency with notice of their claims. First, in enacting the notice requirement, Congress sought "to ease court congestion and avoid unnecessary litigation, while making it possible for the government to expedite the fair settlement of tort claims asserted against the United States." S.Rep.No. 1327, 89th Cong., 2d Sess. 6 [hereinafter cited as S.Rep.], *reprinted in* [1966] U.S. Code Cong. & Admin. News at pp. 2515, 2516. This efficiency purpose, however, accompanies a second purpose "of providing for more fair and equitable treatment of private individuals and claimants when they deal with the government or are involved in litigation with their government." S.Rep. at 5, *reprinted in* [1966] U.S. Code Cong. & Admin. News at pp. 2515-16.

The section 2675 requirement of filing a claim before instituting suit sought to bring the claimants' allegations to the immediate attention

of the relevant agency. S.Rep. at 8, *reprinted in* [1966] U.S. Code Cong. & Admin News at 2518.

...

The two congressional purposes are adequately served if the prerequisite administrative claim is only the giving of "notice of an accident within a fixed time." S.Rep. at 7, *reprinted in* [1966] U.S. Code Cong. & Admin. News at 2715. Congress intended the section 2675 requirement of presenting notice to be construed in light of the notice traditionally given to a municipality by a plaintiff who was allegedly injured by a municipality's negligence. *Id.* Congress deemed this minimal notice sufficient to inform the relevant agency of the existence of a claim.

The purpose of this notice [is] . . . to protect the [government] from the expense of needless litigation, give it an opportunity for investigation, and allow it to adjust differences and settle claims without suit.

*Id.* (quoting 18 E. McQuillin, The Law of Municipal Corporations, § 53.153, at 545 (3d ed. 1977)). This requisite minimal notice, therefore, promptly informs the relevant agency of the circumstances of the accident so that it may investigate the claim and respond either by settlement or by



defense. In addition, as section 2675(b) shows, this notice was to include a statement of damages.

An individual with a claim against the United States, therefore, satisfies section 2675's requirement that "the claimant shall have first presented the claim to the appropriate Federal agency" if the claimant (1) gives the agency written notice of his or her claim sufficient to enable the agency to investigate and (2) places a value on his or her claim. S.Rep. at 7, *reprinted in* [1966] U.S. Code Cong. & Admin. News at 2517. *See generally*, 18 E. McQuillin, The Law of Municipal Corporations § 52.153 (3d ed. 1977); Annot. 62 A.L.R.2d 340, 341-51 (1958). This information alone allows the claimant to maintain a subsequent action in the district court following the denial of his or her claim by the agency or the passage of six months. Noncompliance with section 2675 deprives a claimant of federal court jurisdiction over his or her claim.

## V.

Section 2672 governs agency conduct, including administrative settlement and adjustment of properly presented claims, once notice has been given pursuant to section 2675. *See* S.Rep. at 8, *reprinted in* [1966] U.S. Code Cong. & Admin. News at 2518. It facilitates settlement by authorizing the Department of Justice to promulgate regulations defining the settlement process for administrative claims and authorizing federal agencies to promulgate additional regulations and to "consider, ascertain, adjust, determine, compromise, and settle any claim for money damages

against the United States.” 28 U.S.C. § 2672. Thus, section 2672 creates a structure within which negotiations may occur. Noncompliance with section 2672 deprives a claimant only of the opportunity to settle his or her claim outside the courts.

The requirements of section 2675 and of section 2672 are, therefore, independent. Presentation of a claim and its settlement are distinct processes: “[section 2672] authorize[s] the head of each Federal agency to settle or compromise any tort claim presented to him [under section 2675].” S.Rep. at 8, *reprinted in* [1966] U.S. Code Cong. & Admin. News at 2518.

A claimant will ordinarily comply with 28 C.F.R. §§ 14.1-14.11 if he or she wishes to settle his or her claim with the appropriate agency. These requirements go far beyond the notice requirement of section 2675. Equating these two very different sets of requirements leads to the erroneous conclusion that claimants must settle with the relevant federal agency, if the agency so desires, and must provide the agency with any and all information requested in order to preserve their right to sue. This conclusion is not supported by relevant legislative history.

Congress explicitly recognized that, unlike routine cases, medical malpractice cases “involve difficult legal and damage questions,” S.Rep. at 9, *reprinted in* [1966] U.S. Code Cong. & Admin. News at 2520, questions that are not always amenable to settlement, S.Rep. at 8, *reprinted in* [1966] U.S. Code Cong. & Admin. News at 2518. Agencies

were not intended to bar cases involving difficult issues from federal court by turning their difficulty against the claimants. See *Executive Jet Aviation, Inc. v. United States*, 507 F.2d 508, 515-16 (6th Cir. 1974); S.Rep. at 9, *reprinted in* [1966] U.S. Code Cong. & Admin. News at 2520. Section 2675 was meant to expedite the fair handling of ordinary tort cases in order to free the agencies to concentrate on more difficult cases.

A claimant's refusal to settle his or her claim will not deprive the federal court of jurisdiction, if the claimant has provided the statutorily required notice. Although many claimants will rationally elect to settle their claims, Congress clearly did not deem settlement mandatory.

## VI.

Because Congress' express goals were achieving fairness and efficiency by giving the relevant agency the opportunity to investigate and to settle claims without the expense and delay of litigation, we cannot perceive any legislative authorization for reading the requirements of section 2675 in light of 28 C.F.R. § 14.4. The scheme is rational and coherent without such reading. An agency's demand for anything more than a written and signed statement setting out the manner in which the injury was received, enough details to enable the agency to begin its own investigation, and a claim for money damages is unwarranted and unauthorized. This is especially true if, as here, the agency already possesses most of the information it demanded.

Having satisfied Congressional standards for presenting a claim under 2675, the Adams are not barred from litigating their claim in federal court. The district court thus committed reversible error. The Adams notified the agency of their claim and assigned a value to it. This compliance is not erased merely because they did not obey the Air Force's demand that they provide additional information which would have been necessary for the administrative settlement of their claim.

A federal court's power to adjudicate a tort claim brought against the United States depends solely on whether the claimant has previously complied with the minimal requirements of the statute. 28 U.S.C. § 2675. Federal court power does not depend on whether a claimant has successfully navigated his or her way through the gauntlet of the administrative settlement process, which, according to the vagaries of the claims agent, may touch picayune details, imponderable matters, or both.

...

REVERSED and REMANDED. (Footnotes omitted).<sup>16</sup>

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The FTCA requires a claimant not only to file an administrative claim, but also to allow the agency time to consider the claim.<sup>17</sup> After considering the claim, the government may

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<sup>16</sup> The *Adams* case was affirmed on rehearing. *Adams v. United States*, 622 F.2d 197 (5th Cir. 1980).

<sup>17</sup> 28 U.S.C. § 2675(a) (1994).

respond in three ways: (1) approve and pay the full sum claimed; (2) fully deny the claim; (3) offer to compromise the claim.

When the Army denies a claim, it sends a notice of the denial by certified or registered mail to the claimant.<sup>18</sup> The denial is usually a statement that the government recognizes no liability for the claim. At this point, the claimant has completed the administrative process and is free to file suit in federal district court within six months of the date the denial letter was mailed.<sup>19</sup>

Offers to compromise may be motivated by various factors. The government may acknowledge liability, but believe the claimed damages are excessive. Uncertainties in the law or potential defenses may also be a basis for negotiation. The government views its interest as best served by continuing administrative negotiation with a view toward administrative settlement. Quite often, several years pass and numerous offers and counter-offers are made between the initial filing and the final administrative compromise. The claimant may view the continuing negotiations with the same enthusiasm as the government or perceive the negotiations as futile. A disenchanted claimant may break off negotiations and file suit in federal district court six months after the initial administrative filing<sup>20</sup> or wait until the agency finally denies the claim.

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<sup>18</sup> AR 27-20, para. 2-58.

<sup>19</sup> 28 U.S.C. § 2401(b) (1994). See *McGregor v. United States*, 933 F.2d 156 (2d Cir. 1991) (failure to serve Attorney General within six months bars suit, and filing second suit to remedy error is not permitted); *Woirhaye v. United States*, 609 F.2d 1303 (9th Cir. 1979).

<sup>20</sup> 28 U.S.C. § 2675(a) (1994). The claimant may deem the agency's failure to settle within six months of filing as a "final denial." *Parker v. United States*, 935 F.2d 176 (9th Cir. 1991).

## D. STATUTE OF LIMITATIONS

### 1. Administrative Claim

In many situations, no serious harm results from an improperly drafted or filed claim. The claimant simply files a second, correct claim. The second claim may, however, be barred if the statute of limitations has run before it is filed.

The federal statute of limitations appears at 28 U.S.C. § 2401(b):

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of the mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

This section controls all actions under the FTCA; state statutes of limitations are inapplicable in FTCA cases.<sup>21</sup> Noncompliance with the statute of limitations is an affirmative defense to an FTCA claim against the government.<sup>22</sup>

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<sup>21</sup> *Bradley v. United States by Veteran's Admin.*, 951 F.2d 268 (10th Cir. 1991); *Outman v. United States*, 890 F.2d 1050 (9th Cir. 1989); *Sexton v. United States*, 832 F.2d 629 (D.C. Cir. 1987); *Pittman v. United States*, 341 F.2d 739 (9th Cir. 1965), *cert. denied*, 382 U.S. 941 (1965); *Simon v. United States*, 244 F.2d 703 (5th Cir. 1957).

<sup>22</sup> See *infra* notes 34-39, and accompanying text, discussing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), *reh'g denied*, 498 U.S. 1075 (1991).

The FTCA statute of limitations establishes two limitation periods: (1) an administrative claim must be filed within two years of the date the claim accrues; and (2) suit must be filed within six months of an agency's final denial of the claim. Whether a valid claim exists is a question of state law,<sup>23</sup> but accrual of the claim is a question of federal law.<sup>24</sup> Few issues have generated as much litigation as when an FTCA claim "accrues." The dispute is especially clear in medical malpractice cases, as illustrated by the following case.

**United States v. Kubrick**

**444 U.S. 111 (1979)**

A provision of the Federal Tort Claims Act, 28 U.S.C. § 2401(b), bars any tort claim against the United States unless it is presented in writing to the appropriate federal agency "within two years after such claim accrues." In 1968, several weeks after having an infected leg treated with neomycin (an antibiotic) at a Veterans' Administration hospital, respondent Kubrick suffered a hearing loss, and in January 1969, was informed by a private physician that it was highly possible that the hearing

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<sup>23</sup> 28 U.S.C. §§ 1346(b), 2674 (1994); *Klett v. Pim*, 965 F.2d 587 (8th Cir. 1992) (FTCA cause of action controlled by state law--refusal by FmHA to grant farmer an operating loan is not a state tort); *Richards v. United States*, 369 U.S. 1 (1962); *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957); *Henderson v. United States*, 846 F.2d 1233 (9th Cir. 1988); *Mundt v. United States*, 611 F.2d 1257 (9th Cir. 1980); *Bowen v. United States*, 570 F.2d 1311 (7th Cir. 1978); *Tyminski v. United States*, 481 F.2d 257 (3d Cir. 1973).

<sup>24</sup> *Bradley v. United States by Veteran's Admin.*, 951 F.2d 268 (10th Cir. 1991); *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990); *Sexton v. United States*, 832 F.2d 629 (D.C. Cir. 1987); *Zelevnik v. United States*, 770 F.2d 20 (3d Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986); *Portis v. United States*, 483 F.2d 670 (4th Cir. 1973); *Tyminski v. United States*, 481 F.2d 257 (3d Cir. 1973); *Quinton v. United States*, 304 F.2d 234 (5th Cir. 1962). *Contra Tessler v. United States*, 269 F.2d 305 (1st Cir. 1959).

loss was the result of the neomycin treatment. Subsequently, in the course of respondent's unsuccessful administrative appeal from the VA's denial of his claim for certain veteran's benefits based on the allegation that the neomycin treatment had caused his deafness, another private physician in June 1971 told respondent that the neomycin had caused his injury and should not have been administered. In 1972, respondent filed suit under the FTCA, alleging that he had been injured by negligent treatment at the VA hospital. The District Court rendered judgment for the respondent, rejecting the government's defense that respondent's claim was barred by the 2-year statute of limitations because it had accrued in January 1969, when respondent first learned that his hearing loss had probably resulted from the neomycin, and holding that respondent had no reason to suspect negligence until his conversation with the second physician in June 1971, less than two years before the action was commenced. The Court of Appeals for the Third Circuit affirmed, holding that if a medical malpractice claim does not accrue until a plaintiff is aware of his injury and its cause, neither should it accrue until he knows or should suspect that the doctor who caused the injury was legally blameworthy, and that here the limitation period was not triggered until the second physician indicated in June 1971 that the neomycin treatment had been improper.

We disagree. We are unconvinced that for statute of limitation purposes, a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he



has been injured in fact may be unknown or unknowable until the injury manifests itself, and the facts about causation may be in control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask. If he does ask, and if the defendant has failed to live up to the minimum standards of medical proficiency, the odds are that a competent doctor will so inform the plaintiff.

In this case, the trial court found, and the United States did not appeal its finding, that the treating physician at the VA hospital had failed to observe the standard of care governing doctors of his specialty in Wilkes-Barre, Pa., and that reasonably competent doctors in this branch of medicine would have known that Kubrick should not have been treated with neomycin. Crediting this finding, as we must, Kubrick need only have made inquiry among doctors with average training and experience in such matters to have discovered that he probably had a good cause of action. The difficulty is that it does not appear that Kubrick ever made any inquiry, although meanwhile he had consulted several specialists about his loss of hearing and had been in possession of all the facts about the cause of his injury, since January 1969. Furthermore, there is no reason to doubt that Dr. Soma, who in 1971 volunteered his opinion that

Kubrick's treatment had been improper, would have had the same opinion had the plaintiff sought his judgment in 1969.

We thus cannot hold that Congress intended that "accrual" of a claim must await awareness by the plaintiff that his injury was negligently inflicted. A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort actions against the government. If there exists in the community a generally applicable standard of care with respect to the treatment of his ailment, we see no reason to suppose that competent advice would not be available to the plaintiff as to whether his treatment conformed to that standard. If advised that he has been wronged, he may promptly bring suit. If competently advised to the contrary, he may be dissuaded, as he should be, from pressing a baseless claim. Of course, he may be incompetently advised or the medical community may be divided on the crucial issue of negligence, as the experts proved to be on the trial of this case. But however or even whether he is advised, the putative malpractice plaintiff must determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort claimants must make. If he fails to bring suit because he is incompetently or mistakenly told that he does not have a case, we discern no sound reason for visiting the

consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit, even though more than two years have passed from the plaintiff's discovery of the relevant facts about his injury.

The District Court, 435 F. Supp. at 185, and apparently the Court of Appeals, thought its ruling justified because of the "technical complexity," 581 F.2d at 1097, of the negligence question in this case. But determining negligence or not is often complicated and hotly disputed, so much so that the judge or jury must decide the issue after listening to a barrage of conflicting expert testimony. And if in this complicated malpractice case the statute is not to run until the plaintiff is led to suspect negligence, it would be difficult indeed not to apply the same accrual rule to medical and health claims arising under other statutes and to a whole range of other negligence cases arising under the Act and other federal statutes, where the legal implications or complicated facts make it unreasonable to expect the injured plaintiff, who does not seek legal or other appropriate advice, to realize that his legal rights may have been invaded.

We also have difficulty ascertaining the precise standard proposed by the District Court and the Court of Appeals. On the one hand, the Court of Appeals seemed to hold that a Tort Claims Acts malpractice claim would not accrue until the plaintiff knew or could reasonably be expected to know of the government's breach of duty. 581 F.2d at 1097.

On the other hand, it seemed to hold that the claim would accrue only when the plaintiff had reason to suspect or was aware of facts that would have alerted a reasonable person to the possibility that a legal duty to him had been breached. *Ibid.* In any event, either of these standards would go far to eliminate the statute of limitations as a defense separate from the denial of breach of duty.

It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable. We should give them effect in accordance with what we can ascertain the legislative intent to have been. We doubt that here we have misconceived the intent of Congress when § 2401(b) was first adopted or when it was amended to extend the limitations period to two years. But if we have, or even if we have not but Congress desires a different result, it may exercise its prerogative to amend the statute so as to effect its legislative will.

The judgment of the Court of Appeals is

Reversed.

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*Kubrick* clearly rejected the argument that a plaintiff must know that an injury was negligently inflicted before the statute of limitations begins to run.<sup>25</sup> Knowledge of the injury itself and its cause suffice to start the two-year period running.<sup>26</sup> The *Kubrick* standard is objective; it measures the plaintiff's knowledge of an injury against that of a reasonable person in the plaintiff's position. The claim accrues, and the statute of limitations begins to run, "when a reasonable person would know enough to prompt a deeper inquiry into potential causes."<sup>27</sup>

Courts have shown no reluctance to determine when a plaintiff knew or should have known of the injury.<sup>28</sup> The "cause" prong of the *Kubrick* test has been more troublesome, however.<sup>29</sup> Some courts have held that knowledge of the "immediate cause" of the injury is sufficient to start the statute running. In *Zelevnik v. United States*,<sup>30</sup> an illegal alien murdered the plaintiff's son. Eight years after the murder, the

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<sup>25</sup> 444 U.S. at 123.

<sup>26</sup> *Id.* at 122.

<sup>27</sup> *Nemmers v. United States*, 795 F.2d 628, 632 (7th Cir. 1986), *aff'd*, 870 F.2d 426 (7th Cir. 1989); *See also Barren v. United States*, 839 F.2d 987 (3d Cir. 1988), *cert. denied*, 488 U.S. 827 (1998) (claim accrues when a plaintiff has facts that would enable a reasonable person to discover the alleged negligence, even though the government's negligence may have rendered the plaintiff mentally incapable of appreciating the significance of the facts).

<sup>28</sup> *Bradley v. United States by Veteran's Admin.*, 951 F.2d 268 (10th Cir. 1992) (claim based on insertion and removal of elbow prosthesis more than two years before filing claims barred by SOL); *but see Jastremski v. United States*, 737 F.2d 666 (7th Cir. 1984) (physician-father, who was present in delivery room during difficult and allegedly negligent delivery of his son and who was aware that child suffered seizures within days of birth and subsequently developed an abnormal gait, held not to be aware of child's injury and its cause until 4 years later when a neurologist visiting the father casually observed the child and suggested that the abnormal gait might be caused by cerebral palsy).

<sup>29</sup> *See generally Wagner, United States v. Kubrick: Scope and Application*, 120 Mil. L. Rev. 139, 170-75 (1988).

<sup>30</sup> 770 F.2d 20 (3d Cir. 1985).

plaintiffs learned that the murderer had tried to turn himself in to the Immigration and Naturalization Service (INS) before the killing, but the INS negligently failed to detain him. Within two years of learning about the INS involvement, the plaintiffs filed a tort claim against the United States. The court rejected plaintiff's argument that the statute of limitations did not begin to run until they learned that the actions of the INS "caused" the death of their son. When their son was killed, the plaintiffs knew that they had been injured and the immediate cause of the injury. Those were "sufficient critical facts to put . . . [them] on notice that a wrong ha[d] been committed and that . . . [they] need[ed] [to] investigate to determine whether . . . [they were] entitled to redress."<sup>31</sup>

A more successful argument by claimants has been that accrual is tolled until the plaintiff learns that the government is somehow involved or responsible for his or her injuries. In *Drazan v. United States*,<sup>32</sup> a Veterans Administration hospital failed to follow-up on a suspicious lesion revealed by a chest x-ray during plaintiff's husband's annual physical exam. When the patient returned a year later for his annual physical, the tumor was much larger and was diagnosed as malignant. He died of cancer the following month. Ten months later, plaintiff requested and received her husband's medical records and learned of the earlier failure to follow-up the suspicious x-ray findings. Within two years of receiving the medical records, but more than two years after her husband's death,

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<sup>31</sup> *Id.* at 23. *Accord* *Miller v. United States*, 932 F.2d 301 (4th Cir. 1991) (decedent knew of alleged delay in diagnosing breast cancer in 1984; SOL started in 1984 under Va. law and wrongful death claim filed in 1988 within two years of death was time barred); *Dyniewicz v. United States*, 742 F.2d 484 (9th Cir. 1984); *Steele v. United States*, 599 F.2d 823 (7th Cir. 1979); *Nahsonhoya v. United States*, Civ. #91-946-PHX-SMM (D. Ariz. 1993) (SOL bars child abuse claims where school notified parents of possible abuse even though teacher's subsequent confession not made public).

<sup>32</sup> 762 F.2d 56 (7th Cir. 1985).

the plaintiff filed her tort claim. The government argued, and the district court held, that plaintiff knew of both the injury and its cause when she was told that her husband died of lung cancer. The Court of Appeals reversed and held that “[t]he cause of which a federal tort claimant must have notice for the statute of limitations to begin to run is the cause that is in the government’s control, not a concurrent but independent cause that would not lead anyone to suspect that the government had been responsible for the injury; [t]he notice must be not of harm but of iatrogenic harm.”<sup>33</sup>

The FTCA’s statute of limitations has traditionally been viewed as a jurisdictional requirement; equitable considerations, estoppel, and “waiver” generally did not toll the running of the statute.<sup>34</sup> Recent cases, however, have applied the doctrine of equitable tolling to statutes of limitations previously considered jurisdictional. In *Irwin v. Department of Veterans Affairs*,<sup>35</sup> the Supreme Court held that the statute of limitations in a suit against the government is subject to equitable tolling “in the same way that it is applicable to private suits.” Although *Irwin* involved a suit under Title VII of the Civil Rights Act, the Court clearly intended the holding to apply to all suits against the government. When the Eighth Circuit later applied the jurisdictional rule of the FTCA in *Schmidt v. United States*,<sup>36</sup> the Court remanded the case for reconsideration in light of *Irwin*.<sup>37</sup> Upon remand, the Eighth Circuit held that the FTCA’s statute of limitations is

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<sup>33</sup> *Id.* at 59.

<sup>34</sup> L. JAYSON, HANDLING FEDERAL TORT CLAIMS, § 14.05, (1998).

<sup>35</sup> 498 U.S. 89 (1990), *reh’g denied*, 498 U.S. 1075 (1991).

<sup>36</sup> 901 F.2d 680 (8th Cir. 1990).

<sup>37</sup> *Schmidt v. United States*, 498 U.S. 1077 (1991).

not a jurisdictional prerequisite to suit, but rather an affirmative defense.<sup>38</sup> Since then, virtually all Circuit Courts of Appeal that have faced the issue have acknowledged that the FTCA statute of limitations is, indeed, subject to equitable tolling.<sup>39</sup>

Disabilities such as infancy<sup>40</sup> or incompetence<sup>41</sup> generally will not toll the statute. In both situations, a guardian or next friend can initiate the claim and file suit in federal court. If the government's negligence has caused a claimant's incompetence, however, courts may find that the claim did not accrue, because the plaintiff lacked the mental capacity to understand the significance of the relevant facts.<sup>42</sup>

Deferring accrual for government-caused incompetence may seem equitable, but it ignores the requirement that waivers of sovereign immunity should be strictly

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<sup>38</sup> Schmidt v. United States, 933 F.2d 639,640 (8th Cir. 1991); *see also* Diltz v. United States, 771 F. Supp. 95 (D. Del. 1991) (equitable tolling based on *Irwin* in case of wrongfully placed stitch in eye surgery); Winters v. United States, 953 F.2d 1392 (Table) (10th Cir. 1992) (no equitable extension justified); McKewin v. United States, Civ. V91-131-CIV-5-7 (E.D. N. Car. 1992) (claim for brain damage at 1982 birth, filed 1990--parents knew of cause in 1987, no basis for equitable tolling); Muth v. United States, 804 F. Supp. 838 (S.D. W. Va. 1992), *aff'd*, 1 F.3d 246 (4th Cir. 1993) (no equitable tolling for claim filed in 1991 where claimant acknowledged contamination of land in 1988).

<sup>39</sup> DeCasenave v. United States, 991 F.2d 11 (1st Cir. 1993), Muth v. United States, 1 F.3d 246 (4th Cir. 1993); Krueger v. Saiki, 19 F.3d 1285 (8th Cir. 1994), *cert. denied*, 513 U.S. 905 (1994); Bengé v. United States, 17 F.3d 1286 (10th Cir. 1994). *Contra* Bearden v. United States, 988 F.2d 117 (9th Cir. 1993) (FTCA statute of limitations is jurisdictional and "not subject to equitable tolling") (Unpublished Decision).

<sup>40</sup> Crawford v. United States, 796 F.2d 924 (7th Cir. 1986); Jastremski v. United States, 737 F.2d 666 (7th Cir. 1984); Leonhard v. United States, 633 F.2d 599 (2d Cir. 1980), *cert. denied*, 451 U.S. 908 (1981).

<sup>41</sup> Robbins v. United States, 624 F.2d 971 (10th Cir. 1980); Casias v. United States, 532 F.2d 1339 (10th Cir. 1976).

<sup>42</sup> Washington v. United States, 769 F.2d 1436 (9th Cir. 1985); Clifford v. United States, 738 F.2d 977 (8th Cir. 1984).



construed.<sup>43</sup> It also ignores the objective nature of the *Kubrick* rule. As the Third Circuit observed in *Barren v. United States*:

Although the VA's exacerbation of Barren's infirmity, and the causal relationship between this aggravation and plaintiff's inability to recognize his condition is a compelling reason to excuse his deficiency in failing to file his claim, as *Kubrick* makes clear, the rule cannot be subjectively applied. Allowing Barren to file later than an objectively reasonable person would be tantamount to ruling that a plaintiff's mental infirmity can extend the statute of limitations.<sup>44</sup>

Fraudulent concealment is another exception to the FTCA statute of limitations. The government has no duty to *sua sponte* admit fault or responsibility for a claimant's injury, but the agency may not conceal the facts needed by the plaintiff to determine whether a cause of action exists. The court held in *Harrison v. United States*<sup>45</sup> that a claim filed 10 years after negligent medical treatment was not barred by the statute of limitations, because the Air Force had actively concealed information and failed to provide the plaintiff with her medical records despite repeated requests.

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<sup>43</sup> See, e.g., *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979); *Soriano v. United States*, 352 U.S. 270, 276 (1957); *United States v. Sherwood*, 312 U.S. 584, 590-91 (1941).

<sup>44</sup> 839 F.2d 987, 992 (3d Cir. 1988), *cert. denied*, 488 U.S. 827 (1988).

<sup>45</sup> 708 F.2d 1023 (5th Cir. 1983).

Continuous medical care from government sources may also toll accrual of a plaintiff's claim.<sup>46</sup> Additionally, courts have found that reassurances by government physicians that medical complications are "normal" or of no concern may delay the plaintiff's knowledge of his injury and postpone the running of the statute of limitations.<sup>47</sup>

## 2. Filing Suit.

The second prong of the statute of limitations requires a claimant to file suit within six months of the final denial of his or her claim. After filing the administrative claim, the claimant must allow the agency at least six months to investigate the claim. A lawsuit filed before the expiration of this six-month period will be dismissed for lack of subject matter jurisdiction.<sup>48</sup> If the agency has neither settled nor finally denied the claim within six months, the claimant may "deem the claim denied" and file suit in district court.<sup>49</sup>

A claimant may forego suit after six months have passed and allow the agency more time to investigate and settle the claim. The statute of limitations is tolled indefinitely until the agency denies the claim.<sup>50</sup> Should the agency at any point deny the

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<sup>46</sup> *Wehrman v. United States*, 830 F.2d 1480 (8th Cir. 1987).

<sup>47</sup> *Rosales v. United States*, 824 F.2d 799 (9th Cir. 1987).

<sup>48</sup> *McNeil v. United States*, 508 U.S. 106 (1993) (suit filed before administrative claim or before six months have passed since filing of administrative claim must be dismissed as the court has no jurisdiction even though the six months has run by the time of dismissal).

<sup>49</sup> 28 U.S.C. § 2675(a) (1994).

<sup>50</sup> *McAllister v. United States by U.S. Dept. of Agriculture*, 925 F.2d 841 (5th Cir. 1991) (no time limit for filing suit if no final agency action).

claim by certified or registered mail, however, the claimant must file suit within six months of the date of mailing of the denial letter, or the action will be forever barred,<sup>51</sup>-- even if less than two years have passed since the claim accrued.<sup>52</sup> An agency's oral or "final" settlement offer in negotiations does not satisfy the statutory requirement for a "final denial" that begins the running of the limitation period.<sup>53</sup>

A majority of courts count the six-month period as beginning the day after the notice is mailed and running through the day before the same calendar date six months later.<sup>54</sup> In *McDuffee v. United States*,<sup>55</sup> for example, the VA mailed the notice of denial by certified mail on April 8, 1980, and the plaintiff received the letter the following day. The plaintiff filed suit on October 9, 1980 -- six months to the day after receipt of the denial. The district court rejected as "hypertechnical" the government's argument that the claim was filed one day late. On an interlocutory appeal, the Eighth Circuit reversed and adopted the majority position that the date of mailing was the "trigger day." Under the "modern doctrine," the trigger day was excluded and the last day of the six-month period was included. Since the statute requires suit to be filed "within" six months, the period

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<sup>51</sup> 28 U.S.C. § 2401(b) (1994); *McNeil v. United States*, 964 F.2d 647 (7th Cir. 1992), *aff'd*, 508 U.S. 106 (1993).

<sup>52</sup> *United States v. Udy*, 381 F.2d 455 (10th Cir. 1967); *Anderson v. United States*, 803 F.2d 1520 (9th Cir. 1986).

<sup>53</sup> *Jerves v. United States*, 966 F.2d 517 (9th Cir. 1992).

<sup>54</sup> *Vernell v. U.S. Postal Service*, 819 F.2d 108 (5th Cir. 1987); *McDuffee v. United States*, 769 F.2d 492 (8th Cir. 1985); *Kollios v. United States*, 512 F.2d 1316 (1st Cir. 1975); *McGregor v. United States*, 933 F.2d 156 (2d Cir. 1991) (failure to serve Attorney General within six months bars suit, and filing second suit to remedy error is not permitted).

<sup>55</sup> 769 F.2d 492 (8th Cir. 1985).

must end the day before the same calendar day as the trigger day six months later.<sup>56</sup> In other words, although a few courts have counted the six-month period from the day after mailing the notice of denial to the same calendar date six months later,<sup>57</sup> the last day to file a complaint under the majority rule is exactly sixth months from the day of the mailing of the notice of denial.

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<sup>56</sup> *Id.* at 494 (quoting *Kollios v. United States*, 512 F.2d 1316 (1st Cir. 1975)). *Accord* *Scott v. U.S. Veterans Administration*, 929 F.2d 146 (5th Cir. 1991) (six months runs on April 2 where denial notice mailed on October 2--suit filed on April 3 is untimely).

<sup>57</sup> *Bledsoe v. Dep't of Housing and Urban Dev.*, 398 F. Supp. 315 (E.D. Pa. 1975); *Rodriguez v. United States*, 382 F. Supp. 1 (D.P.R. 1974).



## CHAPTER III. CLAIMANTS

### A. PROPER CLAIMANTS

Individuals, private corporations, governmental entities, aliens, and insurance companies are all eligible to assert claims against the government under the FTCA. The proper claimant for property loss or damage is either the owner of the property, an authorized agent, or a legal representative.<sup>1</sup> An individual is generally a proper claimant under the FTCA if state tort law provides a cause of action in negligence. Assignees are barred as claimants by the Anti-Assignment Act<sup>2</sup> unless the assignment occurs by operation of law.<sup>3</sup> Subrogated claims are permitted whether the subrogation occurs by operation of law or by contract.<sup>4</sup> State law determines the validity of subrogation, but subrogated claims are separate claims and should be paid as such.<sup>5</sup>

The injured person, an authorized agent, or a legal representative may present a claim for personal injury.<sup>6</sup> When a minor is the injured person, two causes of action result under the law of most states. One claim belongs to the child and another to the

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<sup>1</sup> 28 C.F.R. § 14.3(a) (1996); AR 27-20, para. 2-10a.

<sup>2</sup> 31 U.S.C. § 3727 (1994).

<sup>3</sup> *United States v. Shannon*, 342 U.S. 288 (1952); *United States v. Aetna Surety Co.*, 338 U.S. 366 (1949); AR 27-20, para. 2-10g(1).

<sup>4</sup> 28 C.F.R. § 14.3(d) (1996); AR 27-20, para. 2-10eb.

<sup>5</sup> *Robinson v. United States*, 408 F. Supp. 132 (N.D. Ill. 1976).

<sup>6</sup> 28 C.F.R. § 14.3(b) (1996); AR 27-20, para. 2-10-b(1).

parents for medical expenses and loss of services. State law determines who may present the claim on behalf of the child. Derivative claims are separate and must be filed as such.<sup>7</sup>

The executor or administrator of the decedent's estate or any other person legally entitled to assert such a claim under the applicable state law may present a claim based on death.<sup>8</sup> The amount allowed will, to the extent practicable, be apportioned among the beneficiaries as required by the applicable law.

The types of claims that can be filed under the FTCA by federal civilian employees and active duty military personnel are limited. These limitations on claimants stem from the theory that alternative remedies are available or that the claimant's action against the United States might disrupt agency operations.

## **B. CIVILIAN EMPLOYMENT BAR TO LIABILITY**

Civilian employees of the United States receive workers' compensation coverage under the Federal Employees' Compensation Act (FECA).<sup>9</sup> FECA provides compensation where the federal employee is killed or injured "while in the performance of . . . duty." FECA bars FTCA claims based on the initial injury and any medical

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<sup>7</sup> Hunter v. United States, 417 F. Supp. 272 (N.D. Cal. 1976); Green v. United States, 385 F. Supp. 641 (S.D. Cal. 1974); Collazo v. United States, 372 F. Supp. 61 (D. P.R. 1973).

<sup>8</sup> 28 C.F.R. § 14.3(c) (1996); AR 27-20, para. 2-10-b(2).

<sup>9</sup> 5 U.S.C. §§ 8101-8151 (1994). "Employee" is defined broadly and includes all civil officers and employees of the government and its instrumentalities, volunteers, employees of the District of Columbia, ROTC Cadets, Peace Corps volunteers, and most student interns.

treatment stemming from the injury.<sup>10</sup> Like most workers' compensation acts, the employee may recover regardless of government negligence or his own contributory negligence, but the employee forfeits the right to further recovery from the government. FECA is an exclusive remedy for appropriated fund employees for personal injury or death,<sup>11</sup> but not for property losses.<sup>12</sup>

Litigation involving FECA usually turns on whether the employee was "in the performance of . . . duty" at the time of the injury. A government employee who is not performing duties and is injured by government negligence may file an FTCA claim like any other citizen.<sup>13</sup> An employee is generally not performing duties while traveling to and from work,<sup>14</sup> but may be performing duties during breaks and during the lunch hour.<sup>15</sup>

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<sup>10</sup> *Lance v. United States*, 70 F.3d 1093 (9th Cir. 1995).

<sup>11</sup> 5 U.S.C. § 8116(c) (1994). See *Patterson v. United States*, 359 U.S. 495 (1959); *Johansen v. United States*, 343 U.S. 427 (1952); *Woodruff v. U.S. Department of Labor*, 954 F.2d 634 (11th Cir. 1992) (employee in on-post collision is covered by FECA while going off post to buy a sweater during lunch break); *Schmid v. United States*, 826 F.2d 227 (3d Cir. 1987) (FECA coverage for employee playing softball after duty hours); *Grijalva v. United States*, 781 F.2d 472 (5th Cir. 1986), *cert. denied*, 479 U.S. 822 (1986); *Heilman v. United States*, 731 F.2d 1104 (3d Cir. 1984); *Cobra v. United States*, 384 F.2d 711 (10th Cir. 1967), *cert. denied*, 390 U.S. 986 (1968); *Soderman v. U.S. Civil Service Commission*, 313 F.2d 695 (9th Cir. 1962), *cert. denied*, 372 U.S. 968 (1963).

<sup>12</sup> 31 U.S.C. § 3721 (1994); *Holcombe v. United States* 176 F. Supp. 297 (E.D. Va. 1959), *aff'd*, 277 F.2d 143 (4th Cir. 1960). This limitation also does not bar third party indemnity claims against the United States. *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983).

<sup>13</sup> *Martin v. United States*, 566 F.2d 895 (4th Cir. 1977); *Holst v. United States*, 755 F. Supp. 260 (E.D. Mo. 1991) (USPS employee injured while picking up paycheck on day off is not covered under FECA).

<sup>14</sup> *United States v. Browning*, 359 F.2d 937 (10th Cir. 1966).

<sup>15</sup> *Woodruff v. U.S. Department of Labor*, 954 F.2d 634 (11th Cir. 1992) (employee in on-post collision is covered by FECA while going off post to buy a sweater during lunch break).



Any "substantial question" of FECA coverage must be resolved before an FTCA claim may be litigated.<sup>16</sup> The Civilian Personnel Officer is initially responsible for processing FECA claims. The Office of Workers' Compensation Programs (OWCP) investigates and rules on FECA coverage issues; employees may appeal OWCP rulings to the Employees' Compensation Appeals Board. The Secretary of Labor then has final review authority on FECA coverage; no judicial review is allowed.<sup>17</sup> The two-year FTCA statute of limitations is not tolled during the resolution of the FECA coverage issue by the Department of Labor,<sup>18</sup> but the U.S. Army Claims Service will hold a timely filed tort claim in abeyance until the FECA issue is resolved.<sup>19</sup>

Employees of nonappropriated fund activities receive workers' compensation under the Longshoremen's and Harbor Workers' Compensation Act.<sup>20</sup> This act contains compensation and exclusivity provisions similar to those found in FECA.<sup>21</sup>

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<sup>16</sup> *Figueroa v. United States*, 7 F.3d 1405 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994); *Tarver v. United States*, 25 F.3d 900 (10th Cir. 1994); *Reep v. United States*, 557 F.2d 204 (9th Cir. 1977); *Joyce v. United States*, 474 F.2d 215 (3d Cir. 1973).

<sup>17</sup> 5 U.S.C. § 8128 (1994); *Blair v. Secretary of Army*, 51 F.3d 279 (9th Cir. 1995); *Tarver v. United States*, 25 F.3d 900 (10th Cir. 1994); *Grijalva v. United States*, 781 F.2d 472 (5th Cir. 1986), *cert. denied*, 479 U.S. 822 (1986).

<sup>18</sup> *Gunston v. United States*, 235 F. Supp. 349 (N.D. Cal. 1964), *aff'd*, 358 F.2d 303 (9th Cir.), *cert. denied*, 384 U.S. 993 (1966).

<sup>19</sup> See *Claims Notes*, ARMY LAW., Dec. 1987, at 48.

<sup>20</sup> 38 U.S.C. §§ 901-950 (1994); 5 U.S.C. § 8171 (1994).

<sup>21</sup> *Employees' Welfare Commission v. Davis*, 599 F.2d 1375 (5th Cir. 1978); *United States v. Forfari*, 268 F.2d 29 (9th Cir. 1969), *cert. denied*, 361 U.S. 902 (1969); *Dolin v. United States*, 371 F.2d 813 (6th Cir. 1967); *Aubrey v. United States*, 254 F.2d 768 (D.C. Cir. 1958).

FECA is the exclusive remedy for federal workers injured on the job, even if FECA does not pay benefits for certain types of injuries. The following case illustrates the application of this principle.

**Posegate v. United States**

**288 F.2d 11 (9th Cir. 1961)**

[Donald Posegate, a civilian employee on a military artillery range, was severely injured when caught under a nine-ton field piece. Among the consequences of the accident was that Posegate was rendered permanently impotent. Posegate applied for and received FECA benefits. No benefits were authorized for the permanent impotence. Both parties admit no FECA recovery for permanent impotence is authorized. Posegate sued under the Tort Claims Act. The government defended on the basis of the exclusivity provision of FECA.]

Appellants' contention is that though Donald has received hospitalization, surgery and medical treatment from the date of the injury and though an award has been made to him, this award is only for some of the injuries which he has received. He claims that his present condition of permanent impotence is a non-disabling injury, that he has received no compensation for this injury, and that he has been advised by the Bureau of Employees' Compensation of the United States Department of Labor that "[c]ompensation under the Federal Employees' Compensation Act is based on loss of wage earning capacity. There is no provision in the law to cover the condition you mentioned." He therefore contends that he has

the right to sue the United States under the Federal Tort Claims Act for the negligence of its agents which proximately caused the serious but non-disabling injuries complained of. We do not agree.

Similar claims have arisen under state workmen's compensation and similar statutes, and recovery in these cases has been denied. *Hyett v. Northwestern Hospital*, 1920, 147 Minn. 413, 180 N.W. 552 (sexual powers reduced); *Farnum v. Garner Print Works*, 1920, 229 N.Y. 554, 129 N.E. 912 (unable to beget children); *Freese v. John Morrell & Co.*, 1931, 58 S.D. 237 N.W. 886 (loss of testicle-pain and suffering).

In *Smither & Co., Inc. v. Coles*, 1957, 100 U.S. App. D.C. 68, 242 F.2d 220, which was an action by a wife for loss of consortium after her husband had received the maximum benefits under the District of Columbia Workmen's Compensation Act, the court said:

The history of the development of statutes, such as this, creating a compensable right independent of the employer's negligence and notwithstanding an employee's contributory negligence, recalls that the keystone was the exclusiveness of the remedy. This concept emerged from a balancing of the sacrifices and gains of both employees and employers, in which the former relinquished whatever rights they had at common law in exchange for a sure recovery under the compensation statutes, while the employers on their part, in accepting a definite and

exclusive liability, assumed an added cost of operation which in time could be actuarially measured and accurately predicted; incident to this both parties realized a saving in the form of reduced hazards and cost of litigation. As stated by Mr. Justice Brandeis in *Bradford Electric Co. v. Clapper*, 1932, 286 U.S. 145, 159, 52 S.Ct. 571, 576, 76 L.Ed. 1026, the purpose of these laws was to provide 'not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinative.' "

The language of §§ 751(a) and 757(b) of the Federal Employees' Compensation Act as quoted above is plain and unambiguous. Under the statute the employee, regardless of any negligence, is to receive in case of injury certain definite amounts, which recovery "shall be exclusive, and in place, of all other liability of the United States." His recovery is not dependent upon the injury being caused by the negligence of any employees of the United States, nor is it reduced or taken from him if the injury is the result of his own negligence. That the remedy provided by the Federal Employees' Compensation Act is to be exclusive is shown by the legislative history of Congress at the time the statute was amended in 1949....

It thus appears that neither the plain language of the statute, its legislative history, nor the prior construction of similar statutes permits a

recovery by appellant. Donald Posegate was a "person protected by the act." He received medical treatment and substantial payments under the Federal Employees' Compensation Act as a result of the accident in question. We hold that he cannot recover under the Federal Tort Claims Act for his claimed non-disabling injury.

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FECA coverage not only bars an initial FTCA claim, it can also bar a later claim based on malpractice during treatment of a FECA-covered injury<sup>22</sup> or claims by persons treated as military dependents who are also civilian employees.<sup>23</sup> It is irrelevant to the FTCA bar that the injured employee did not request FECA coverage for the injuries sustained; the bar applies to all work-related injuries.<sup>24</sup>

### **C. MILITARY CLAIMANTS - "INTRAMILITARY TORT IMMUNITY"**

The most difficult and controversial FTCA claimant cases involve military personnel. The statute itself does not exclude service personnel as claimants; however, two early Supreme Court decisions limit the claims that may be raised by military personnel.

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<sup>22</sup> *Scheppan v. United States*, 810 F.2d 461 (4th Cir. 1987) (PHS official claim for negligent medical treatment barred).

<sup>23</sup> *McCall v. United States*, 901 F.2d 548 (6th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990) (FECA coverage bars medical malpractice for on-the-job injury of federal employee even though surgery was furnished on the basis employee was a military dependent).

**Brooks v. United States**

**337 U.S. 49 (1949)**

This is a suit against the United States under the Federal Tort Claims Act, 28 U.S.C.A. § 921 [Aug. 2, 1946] 60 Stat. 812, 842, c 753, now 28 U.S.C. (1948 ed.) § 2671. The question is whether members of the United States Armed Forces can recover under the Act for injuries not incident to their service. The District Court for the Western District of North Carolina entered judgment against the government, rendering an unreported opinion, but the Court of Appeals for the Fourth Circuit reversed, in a divided decision. 169 F.2d 840. We brought the case here on *certiorari* because of its importance as an interpretation of the Act.

The facts are these. Welker Brooks, Arthur Brooks, and their father, James Brooks, were riding in their automobile along a public highway in North Carolina on a dark, rainy night in February 1945. Arthur was driving. He came to a full stop before entering an intersection, and proceeded across the nearer land of the intersecting road. Seconds later the car was struck from the left by a United States Army truck, driven by a civilian employee of the Army. Arthur Brooks was killed; Welker and his father were badly injured.

Welker and the administrator of Arthur's estate brought actions against the United States in the District Court. The District Judge tried the

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<sup>24</sup> *Figueroa v. United States*, 7 F.3d 1405 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994).

causes without a jury and found negligence on the part of the truck driver. The government moved to dismiss on the ground that Welker and his deceased brother were in the armed forces of the United States at the time of the accident, and were therefore barred from recovery. The court denied the motion, entering a \$25,425 judgment for the decedent's estate, and a \$4,000 judgment for Welker. On appeal, however, the government's argument persuaded the Court of Appeals to reverse the judgment, Judge Parker dissenting.

We agree with Judge Parker. The statute's terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that "any claim" means "any claim but that of servicemen." The statute does contain twelve exceptions. § 421, 28 U.S.C.A. § 943; now 28 U.S.C. 1948 ed. § 2680. None exclude petitioner's claims. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or naval forces, or Coast Guard, during time of war. These and other exceptions are too lengthy, specific, and close to the present problem to take away petitioners' judgments. Without resorting to an automatic maxim of construction, such exceptions make it clear to use that Congress knew what it was about when it used the term "any claim." It would be absurd to believe that Congress did not have servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.

More than the language and framework of the act support this view. There were eighteen tort claims bills introduced in Congress between 1925 and 1935. All but two contained exceptions denying recovery to members of the armed forces. When the present Tort Claims Act was first introduced, the exception concerning servicemen had been dropped. What remained from previous bills was an exclusion of all claims for which compensation was provided by the World War Veterans Act of [June 7] 1924-43 Stat. 607, c 320, 38 U.S.C.A. § 421, 11 FCA title 38, § 421, compensation for injury or death occurring in the first World War. HR 181, 79th Cong. 1st Sess. When HR 181 was incorporated into the Legislative Reorganization Act, the last vestige of the armed forces exception disappeared. 2 SYRACUSE LAW REV. 87, 93, 94.

The government envisages dire consequences should we reverse the judgment. A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States. But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it, but we may note that only in this context do *Dobson v. United States* (CCA.2d NY) 27 F.2d 807; *Bradley v. United States* (CCA.2d NY) 151 F.2d 742; and *Jefferson v. United States* (D.C. Md.) 77



F. Supp. 706, have any relevance. See the similar distinction in 32 U.S.C.A. § 223b, 9 FCA, title 31, § 223b. Interpretation of the same words may vary, of course, with the consequences, for those consequences may provide insight for determination of congressional purpose. *Lawson v. Suwannee Fruit & S.S. Co.*, 33 U.S. 198, *ante*, 611, 69 S.Ct. 503. The government's fears may have point in reflecting congressional purpose to leave injuries incident to service where they were, despite literal language and other considerations to the contrary. The result may be so outlandish that even the factors we have mentioned would not permit recovery. But that is not the case before us.

Provisions in other statutes for disability payments to servicemen, and gratuity payments to their survivors, 38 U.S.C.A. § 701, 11 FCA title 38, § 701, indicate no purpose to forbid tort actions under the Tort Claims Act. Unlike the usual workman's compensation statute, *e.g.*, 33 U.S.C.A. § 905, 10 FCA title 22, § 905, there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy. *United States v. Standard Oil Co.*, 332 U.S. 301, 91 L.Ed. 2067, 67 S.Ct. 1604, indicates that, so far as third party liability is concerned. Nor did Congress provide for an election of remedies, as in the Federal Employees' Compensation Act, 5 U.S.C.A. § 757, 2 FCA title 5, § 757. Thus *Dahn v. Davis*, 258 U.S. 421, 66 L.Ed. 696, 42 S.Ct. 320, and cases following that decision, are not on point. *Compare Parr v. United States* (CAA 10th Kan.) 172 F.2d 462. We will not call either remedy in the present case

exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so. *Compare* 31 U.S.C.A. § 224b, 9 FCA title 31, § 224b, specifically repealed by the Tort Claims Act, § 424(a). In the very Act we are construing, Congress provided for exclusiveness of the remedy in three instances, §§ 403(b), 410(b), and 423, and omitted any provisions which would govern this case.

But this does not mean that the amount payable under the servicemen's benefit laws should not be deducted, or taken into consideration, when the serviceman obtains judgment under the Tort Claims Act. Without the benefit of argument in this Court, or discussions of the matter in the Court of Appeals, we now see no indication that Congress meant the United States to pay twice for the same injury. Certain elements of tort damages may be the equivalent of elements taken into account in providing disability payments. It would seem incongruous, at first glance, if the United States should have to pay in tort for hospital expenses it has already paid, for example. And whatever the legal theory behind a wrongful death action, the same considerations might apply to the government's gratuity death payment to Arthur Brooks' survivors, although national service life insurance might be considered a separate transaction, unrelated to an action in tort or other benefits.

But the statutory scheme and the Veterans' Administration regulations may dictate a contrary result. The point was not argued in the case as it came to us from the Court of Appeals. The court below does not

appear to have passed upon it; it was unnecessary, in the view they took of the case. We do not know from this record whether the government objected to this portion of the District Court judgment--nor can we tell from this record whether the Court of Appeals should consider a general objection to the judgment sufficient to allow it to consider this problem. Finally, we are not sure how much deducting the District Court did. It is obvious that we are in no position to pass upon the question of deducting other benefits in the case's present posture.

We conclude that the language, framework, and legislative history of the Tort Claims Act require a holding that petitioners' actions were well founded. But we remand to the Court of Appeals for its consideration of the problem of reducing damages *pro tanto*, should it decide that such consideration is proper in view of the District Court judgment and the parties' allegation of error.

Reversed and remanded.

Mr. Justice Frankfurter and Mr. Justice Douglas dissent, substantially for the reasons set forth by Judge Dobie, below, 169 F.2d 840.

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The next case, comprised of three separate cases, presented the "wholly different case" not decided in *Brooks*. Two of the cases involved malpractice by military doctors on active duty servicemen, and the third arose out of a barracks fire that killed plaintiff's

decedent. In all three cases, a government actor was clearly culpable. The Supreme Court granted *certiorari* and consolidated them into one decision. The resulting ruling is now known as the "*Feres* doctrine."

### **Feres v. United States**

**340 U.S. 135 (1950)**

Mr. Justice Jackson delivered the opinion of the Court.

A common issue arising under the Tort Claims Act, as to which Courts of Appeal are in conflict, makes it appropriate to consider three cases in one opinion.

The *Feres* case: The District Court dismissed an action by the executrix of Feres against the United States to recover for death caused by negligence. Decedent perished by fire in the barracks at Pine Camp, New York, while on active duty in the service of the United States. Negligence was alleged in quartering him in barracks known or which should have been known to be unsafe because of a defective heating plant, and in failing to maintain an adequate fire watch. The Court of Appeals, Second Circuit, affirmed.

The *Jefferson* case: Plaintiff, while in the Army, was required to undergo an abdominal operation. About eight months later, in the course of another operation after plaintiff was discharged, a towel 30 inches long by 18 inches wide, marked "Medical Department U.S. Army," was discovered and removed from his stomach. The complaint alleged that it

was negligently left there by the army surgeon. The District Court, being doubtful of the law, refused without prejudice the government's pretrial motion to dismiss the complaint. After trial, finding negligence as a fact, Judge Chestnut carefully reexamined the issue of law and concluded that the Act does not charge the United States with liability in this type of case. The Court of Appeals, Fourth Circuit, affirmed.

The *Griggs* case: The District Court dismissed the complaint of Griggs' executrix, which alleged that while on active duty he met death because of negligent and unskillful medical treatment by army surgeons. The Court of Appeals, Tenth Circuit, reversed and one judge dissenting, held that the complaint stated a cause of action under the Act.

The common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces. The only issue of law raised is whether the Tort Claims Act extends its remedy to one sustaining "incident to the service" what under other circumstances would be an actionable wrong. This is the "wholly different case" reserved from our decision in *Brooks v. United States*, 337 U.S. 49, 52.

There are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind. Under these circumstances, no conclusion can be above

challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy.

We do not overlook considerations persuasive of liability in these cases. The Act does confer district court jurisdiction generally over claims for money damages against the United States founded on negligence. 28 U.S.C.A. § 1346(2)(b), FCA title 28, § 1346(2)(b). It does contemplate that the government will sometimes respond for negligence of military personnel, for it defines "employee of the government" to include "members of the military or naval forces of the United States," and provides that "acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in "line of duty." 28 U.S.C.A. § 2671, FCA title 28, § 2671. Its exceptions might also imply inclusion of claims such as we have here. 28 U.S.C.A. § 2680(j), FCA title 28, § 2680(j) except "any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war" (emphasis supplied), from which it is said we should infer allowance of claims arising from noncombatant activities in peace. Section 2680(k) excludes "any claim arising in a foreign country." Significance also has been attributed in these cases, as in the *Brooks* case, *supra* (337 U.S. p. 51, 93 L.Ed. 1203, 90 S.Ct. 918, 25 NCCA NA 1), to the fact that eighteen tort bills were introduced in Congress between 1925 and 1935 and all but two expressly denied recovery to members of the armed forces; but the bill enacted as the present Tort Claims Act from its

introduction made no exception. We are also reminded that the *Brooks* case, in spite of its reservation of service-connected injuries, interprets the Act to cover claims not incidental to service, and it is argued that much of its reasoning is as apt to impose liability in favor of a man on duty as in favor of one on leave. These considerations, it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury as the government fears.

This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the government to make a workable, consistent and equitable whole. The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit. While the political theory that the King could do no wrong was repudiated in America, a legal doctrine derived from it that the Crown is immune from any suit to which it has not consented was invoked on behalf of the Republic and applied by our courts as vigorously as it had been on behalf of the Crown. As the Federal government expanded its activities, its agents caused a multiplying number of remediless wrongs--wrongs which would have been actionable if inflicted by an individual or corporation but remediless solely because their perpetrator was an officer or employee of the government. Relief was often sought and sometimes granted through

private bills in Congress, the number of which steadily increased as government activity increased. The volume of these private bills, the inadequacy of congressional machinery for determination of facts, the importunities to which claimants subjected members of Congress, and the capricious results, led to a strong demand that claims for tort wrongs be submitted to adjudication. Congress already had waived immunity and made the government answerable for breaches of contracts and certain other types of claims. At last, in connection with the Reorganization Act, it waived immunity and transferred the burden of examining tort claims to the courts. The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional. Congress was suffering from no plague of private bills on behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute.

Looking to the detail of the Act, it is true that it provides, broadly, that the District Court "shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . ." This confers jurisdiction to render judgment upon all such claims. But it does not say that all claims must be allowed. Jurisdiction is necessary to deny a claim on its merits as a matter of law as much as to adjudge that liability exists. We interpret this language to mean all it says, but no more. Jurisdiction of the defendant now exists where the defendant was immune from suit



before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable law.

For this purpose, the Act goes on to prescribe the test of allowable claims, which is "The United States shall be liable, . . . in the same manner and to the same extent as a private individual under the circumstances . . . ." with certain exceptions not material here. 28 U.S.C.A. § 2674, FCA title 28, § 2674. It will be seen that this is not the creation of new causes of action but acceptance of liability under circumstance that would bring private liability into existence. This, we think, embodies the same idea that its English equivalent enacted in 1947 (Crown Proceedings Act 1947; 10 & 11 Geo. VI, ch. 44, p. 863), expressed, "Where any person has a claim against the Crown after the commencement of this Act, and, if this Act had not been passed, the claim might have been enforced, subject to the grant . . . of consent to be sued, the claim may now be enforced without specific consent." One obvious shortcoming in these claims is that plaintiffs can point to no liability of a "private individual" even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officer or the government he is serving. Nor is there any liability "under like circumstances," for no private individual has power to conscript or mobilize a private army with such authorities over persons as the government vests in echelons of command. The nearest parallel, even if

we were to treat "private individual" as including a state, would be the relationship between the states and their militia. But if we indulge plaintiffs the benefit of this comparison, claimants cite us no state, and we know of none which has permitted members of its militia to maintain tort actions for injuries suffered in the service, and in at least one state the contrary has been held to be the case. It is true that if we consider relevant only part of the circumstances and ignore the status of both the wronged and the wrong-doer in these cases we find analogous private liability. In the usual civilian doctor and patient relationship, there is a course of liability for malpractice. And a landlord would undoubtedly be held liable if an injury occurred to a tenant as the result of a negligently maintained heating plant. But the liability assumed by the government here is that created by "all the circumstances," not that which a few of the circumstances might create. We find no parallel liability before and we think no new one has been created by this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the government with novel and unprecedented liabilities.

It is not without significance as to whether the Act should be construed to apply to service-connected injuries that it makes "... the law where the act or omission occurred" govern any consequent liability. 28 U.S.C.A. § 1346(2)(b), FCA title 28, § 1346(2)(b). This provision recognizes and assimilates into federal law the rules of substantive law of the several states, among which divergences are notorious. This perhaps is

fair enough when the claimant is not on duty or is free to choose his own habitat and thereby limit the jurisdiction in which it will be possible for federal activities to cause him injury. That his tort claims would be governed by the law of the location where he has elected to be is just as fair when the defendant is the government as when the defendant is a private individual. But a soldier on active duty has no such choice and must serve any place or, under modern conditions, any number of places in quick succession in the forty-eight States, the Canal Zone, or Alaska, or Hawaii, or any other Territory of the United States. That the geography of an injury should select the law to be applied to his tort claims makes no sense. We cannot ignore the fact that most states have abolished the common-law action for damages between employer and employee and superseded it with workmen's compensation statutes which provide, in most instances, the sole basis of liability. Absent this, or where such statutes are inapplicable, states have differing provisions as to limitations of liability and different doctrines as to assumption of risk, fellow-servant rules and contributory or comparative negligence. It would hardly be a national plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value.

The relationship between the government and members of its armed forces is "distinctly federal in character," as this Court recognized in *United States v. Standard Oil Co.*, 332 U.S. 301, 91 L.Ed. 2067, 67

S.Ct. 1604, wherein the government unsuccessfully sought to recover for losses incurred by virtue of injuries to a soldier. The considerations which lead to that decision apply with even greater force to this case: “. . . To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents, and consequences of the relation between persons in service and the government are fundamentally derived from federal sources and governed by federal authority. See *Tarbel's Case*, 13 Wall 397; *Kurtz v. Moffitt*, 115 U.S. 487. . . .”

No federal law recognizes recovery such as claimants seek. The Military Personnel Claims Act, 31 U.S.C.A. § 223(b), FCA title 31 § 223(b) (now superseded by 28 U.S.C.A. § 2671), permitted recovery in some circumstances, but it specifically excluded claims of military personnel “incident to their service.”

This Court in deciding claims for wrong incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactment by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy. There is as

much statutory authority for one as for another of these conclusions. If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.

A soldier is at peculiar disadvantage in litigation. Lack of time and money, the difficulty if not impossibility of procuring witnesses, are only a few of the factors working to his disadvantage. And the few cases charging superior officers or the government with neglect or misconduct which have been brought since the Tort Claims Act of which the present are typical, have either been suits by widows or surviving dependents, or have been brought after the individual was discharged. The compensation system, which normally requires no litigation, is not negligible or niggardly, as these cases demonstrate. The recoveries compare extremely favorably with those provided by most workmen's compensation statutes. In the *Jefferson* case, the District Court considered actual and prospective payments by the Veterans Administration as diminution of verdict. Plaintiff received \$3,645.50 to the date of the court's computation and on estimated life expectancy under existing legislation would prospectively receive \$31,947 in addition. In the *Griggs* case, the widow, in the two year period after her husband's death, received payments in excess of

\$2,100. In addition she received \$2,695 representing the six months' death gratuity under the Act of December 17, 1943 as amended, 41 Stat. 367, ch. 6 [Dec. 17, 1943] 47 Stat. 599, ch. 343, 10 U.S.C.A. § 903, FCA title 10, § 903. It is estimated that her total future pension payments will aggregate \$18,000. Thus the widow will receive an amount in excess of \$22,000 from government gratuities, whereas she sought and could seek under state law only \$15,000, the maximum permitted by Illinois for death.

It is contended that all these considerations were before the Court in the *Brooks* case and that allowance of recovery to Brooks requires a similar holding of liability here. The actual holding in the *Brooks* case can support liability here only by ignoring the vital distinction there stated. The injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission. A government-owned and operated vehicle collided with him. Brooks' father, riding in the same car, recovered for his injuries and the government did not further contest the judgment but contended that there could be no liability to the sons, solely because they were in the Army. This Court rejected the contention, primarily because Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders.

We conclude that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arose out of

or are in the course of activity incident to service. Without exception, the relationship of military personnel to the government has been governed exclusively by federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command. Accordingly, the judgments in the *Feres* and *Jefferson* cases are affirmed and that in the *Griggs* case is reversed.

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In the years that followed the *Feres* decision, three broad rationales were asserted to justify the doctrine:

In the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of a soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of duty.'<sup>25</sup>

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<sup>25</sup> *United States v. Muniz*, 374 U.S. 150, 162 (1963) (quoting *United States v. Brown*, 348 U.S. 110, 112 (1954)).

In determining whether a plaintiff was injured “incident to service” and thus barred from bringing a claim under the FTCA, courts have usually considered three factors: (1) the function or activity being performed at the time of the injury; i.e., whether the plaintiff was engaged in some military-related activity, using a facility, taking advantage of a privilege, or enjoying a benefit available because of his military status; (2) the situs of the injury; i.e., whether the plaintiff was on or off the military installation when the injury occurred; and (3) the duty status of the plaintiff at the time of the injury; i.e., whether on duty or on pass, leave, or furlough.<sup>26</sup> Various courts dismiss FTCA claims, citing any one of these factors as controlling in the “incident to service” analysis.<sup>27</sup>

The so-called “traditional factors” are not, however, a talisman that dictates the result in all cases. The inquiry is not: “Where was the service member when the injury occurred, what function was he performing, and what was his duty status?” The analysis must instead focus on the ultimate issue of: “Was the plaintiff injured ‘incident to service?’ ” The Supreme Court dealt with the “incident to service” question in the absence of “traditional factors” in the following case.

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<sup>26</sup> See, e.g., *Elliot v. United States*, 13 F.3d 1555 (11th Cir. 1994), *aff’d en banc*, 37 F.3d 617 (11th Cir. 1994); *Thompson v. United States*, 8 F.3d 30 (9th Cir. 1993), *cert. denied*, 510 U.S. 1911 (1994); *Coltrain v. United States*, 999 F.2d 542 (9th Cir. 1993); *Shaw v. United States*, 854 F.2d 360 (10th Cir. 1988); *Pierce v. United States*, 813 F.2d 349 (11th Cir. 1987); *Bon v. United States*, 802 F.2d 1092 (9th Cir. 1986); *Flowers v. United States*, 764 F.2d 759 (11th Cir. 1985); *Warner v. United States*, 720 F.2d 837 (5th Cir. 1983); *Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980); *Uptegrove v. United States*, 600 F.2d 1248 (9th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980).

<sup>27</sup> For a matrix that includes the factors mentioned above and the decisions of courts in 17 representative cases, see *Flowers v. United States*, 764 F.2d 759, 762-63 (11th Cir. 1985).



## Shearer v. United States

473 U.S. 52 (1985)

[The mother of PVT Vernon Shearer, a Fort Bliss soldier who was killed by PVT Andrew Heard while the two were on leave in New Mexico, filed suit against the United States alleging that the Army's negligence in failing to discharge PVT Heard when they knew of his dangerous propensities was the cause of her son's death. PVT Heard had been previously convicted by a German court and served time in German prison for homicide. After his release from prison he was reassigned to the United States but had not been discharged. The district court dismissed the action and the Third Circuit reversed. The circuit court reasoned that since the actual injury, the death of Shearer, took place off the installation while the soldiers were on authorized leave, and since at the time of his death Shearer was not engaged in any sort of military activity or using any military benefit or facility, the *Feres* doctrine did not bar the action.]

## II

Our holding in *Feres v. United States*, 340 U.S. 135 (1950), was that a soldier may not recover under the Federal Tort Claims Act for injuries which "arise out of or are in the course of activity incident to service." *Id.*, at 146. Although the Court in *Feres* based its decision on several grounds,

[i]n the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent

orders given or negligent acts committed in the course of military duty.’ *United States v. Muniz*, 374 U.S. 150, 162 (1963), quoting *United States v. Brown*, 348 U.S. 110, 112 (1954).

The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases. Here, the Court of Appeals placed great weight on the fact that Private Shearer was off duty and away from the base when he was murdered. But the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions, see *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977), and whether the suit might impair essential military discipline, see *Chappell v. Wallace*, 462 U.S. 296, 300, 304 (1983).

Respondent’s complaint strikes at the core of these concerns. In particular, respondent alleges that Private Shearer’s superiors in the Army “negligently and carelessly failed to exert reasonably sufficient control over Andrew Heard, . . . failed to warn other persons that he was at large, [and] negligently and carelessly failed to . . . remove Andrew Heard from active military duty.” App. 14. This allegation goes directly to the “management” of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman.

Respondent’s case is therefore quite different from *Brooks v. United States*, 337 U.S. 49 (1949), where the Court allowed recovery

under the Tort Claims Act for injuries caused by a negligent driver of a military truck. Unlike the negligence alleged in the operation of a vehicle, the claim here would require Army officers "to testify in court as to each others decisions and actions." *Stencel Aero Engineering Corp. v. United States*, *supra* at 673. To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct. But as we noted in *Chappell v. Wallace*, such " 'complex, subtle, and professional decisions as to the composition, training, . . . and control of a military force are essentially professional military judgments.' " 462 U.S. at 302, quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

Finally, respondent does not escape the *Feres* net by focusing only on this case with a claim of negligence, and by characterizing her claim as a challenge to a "straightforward personnel decision." Tr. of oral Arg. 37. By whatever name it is called, it is a decision of command. The plaintiffs in *Feres* and *Stencel Aero Engineering*, did not contest the wisdom of broad military policy; nevertheless, the Court held that their claims did not fall within the Tort Claims Act because they were the type of claims that, if generally permitted would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness. Similarly,

respondent's attempt to hale Army officials into court to account for their supervision and discipline of Private Heard must fail.

### III

Special Assistant to the Attorney General Holtzoff, testifying on behalf of the Attorney General, described the proposed Federal Tort Claims Act as "a radical innovation" and thus counseled Congress to "take it step by step." Tort Claims Against the United States: Hearings on H.R. 7236 before Subcommittee No. 1 of the House Committee on the Judiciary, 76th Cong., 3d Sess., 22 (1940). We hold that Congress has not undertaken to allow a serviceman or his representative to recover from the government for negligently failing to prevent another serviceman's assault and battery. Accordingly, the judgment of the Court of Appeals is Reversed.

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Some lower courts read the *Shearer* decision as abandoning traditional *Feres* analysis and sanctioning an *ad hoc* determination of whether a particular case would have an adverse impact upon military discipline.<sup>28</sup> The Court corrected that misperception in *United States v. Johnson*.<sup>29</sup>

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<sup>28</sup> See, e.g., *Atkinson v. United States*, 804 F.2d 561, 563 (9th Cir. 1986) ("Because *Shearer* makes clear that the paramount concern is with the military decisions or discipline, in each case, we must determine the effect of a particular suit on military decisions or discipline"), modified, 813 F.2d 1006 (9th Cir.), rev'd on rehearing, 825 F.2d 202 (9th Cir. 1987); *Johnson v. United States*, 779 F.2d 1492, 1493-94 (11th Cir. 1986) ("[*Shearer* places special emphasis] . . . upon military discipline and whether or not the claim being considered would require civilian courts to second-guess military decisions"), rev'd sub nom, 481 U.S. 681 (1987).

<sup>29</sup> 481 U.S. 681 (1987).

**United States v. Johnson**

**481 U.S. 681 (1987)**

Justice Powell delivered the opinion of the Court.

This case presents the question whether the doctrine established in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950) bars an action under the Federal Tort Claims Act on behalf of a service member killed during the course of an activity incident to service, where the complaint alleges negligence on the part of civilian employees of the Federal government.

**I**

Lieutenant Commander Horton Winfield Johnson was a helicopter pilot for the United States Coast Guard, stationed in Hawaii. In the early morning of January 7, 1982, Johnson's Coast Guard station received a distress call from a boat lost in the area. Johnson and a crew of several other Coast Guard members were dispatched to search for the vessel. Inclement weather decreased the visibility, and so Johnson requested radar assistance from the Federal Aviation Administration (FAA), a civilian agency of the Federal government. The FAA controllers assumed positive radar control over the helicopter. Shortly thereafter, the helicopter crashed into the side of a mountain on the island of Molokai. All the crew members, including Johnson, were killed in the crash.

Respondent, Johnson's wife, applied for and received compensation for her husband's death pursuant to the Veterans' Benefits

Act, 72 Stat. 1118, as amended, 38 U.S.C. § 301 *et seq.* (1982 ed. and Supp. III). In addition, she filed suit in the United States District Court for the Southern District of Florida under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346, 2671-2680. Her complaint sought damages from the United States on the ground that the FAA flight controllers negligently caused her husband's death. The government filed a motion to dismiss, asserting that because Johnson was killed during the course of his military duties, respondent could not recover damages from the United States. The District Court agreed and dismissed the complaint, relying exclusively on this Court's decision in *Feres*.

The Court of Appeals for the Eleventh Circuit reversed. 749 F.2d 1530 (CA 11 1985). It noted the language of *Feres* that precludes suits by service members against the government for injuries that "arise out of or are in the course of activity incident to service." 340 U.S., at 146, 71 S.Ct., at 159. The court found, however, that the evolution of the doctrine since the *Feres* decision warranted a qualification of the original holding according to the alleged status of the tortfeasor. The court identified what it termed "the typical *Feres* factual paradigm" that exists when a service member alleges negligence on the part of another member of the military. 749 F.2d, at 1537. "[W]hen the *Feres* factual paradigm is present, the issue is whether the injury arose out of or during the course of an activity incident to service." *Ibid.* But when negligence is alleged on the part of a Federal government employee who is not a member of the military, the

court found that the propriety of a suit should be determined by examining the rationales that underlie the *Feres* doctrine. Although, it noted that this Court has articulated numerous rationales for the doctrine, it found the effect of a suit on military discipline to be the doctrine's primary justification.

Applying its new analysis to the facts of his case, the court found "absolutely no hint . . . that the conduct of any alleged tortfeasor even remotely connected to the military will be scrutinized if this case proceeds to trial." 749 F.2d at 1539. Accordingly, it found that *Feres* did not bar respondent's suit.

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The Court of Appeals granted the government's suggestion for rehearing en banc. The en banc court found that this Court's recent decision in *United States v. Shearer*, 473 U.S. 52, 105 S.Ct. 1019, 87 L.Ed.2d 38 (1985) "reinforc[ed] the analysis set forth in the panel opinion," 779 F.2d 1492, 1493 (CA 11 1986) (*per curiam*), particularly the "[s]pecial emphasis . . . upon military discipline and whether or not the claim being considered would require civilian courts to second-guess military decisions," *Id.*, at 1493-1494. It concluded that the panel properly had evaluated the claim under *Feres* and therefore reinstated the panel opinion. Judge Johnson, joined by three other judges, strongly dissented. The dissent rejected the "*Feres* factual paradigm" as identified by the court, finding that because "Johnson's injury was undoubtedly sustained

incident to service, . . . under current law our decision ought to be a relatively straightforward affirmance.” *Id.*, at 1494.

We granted certiorari, 479 U.S. 811, (1986), to review the Court of Appeals’ reformulation of the *Feres* doctrine and to resolve the conflict among the Circuits on this issue. We now reverse.

## II

In *Feres*, this Court held that service members cannot bring tort suits against the government for injuries that “arise out of or are in the course of activity incident to service.” 340 U.S., at 146, 71 S.Ct., at 159. This Court has never deviated from this characterization of the *Feres* bar. Nor has Congress changed this standard in the close to 40 years since it was articulated, even though, as the Court noted in *Feres*, Congress “possess a ready remedy” to alter a misinterpretation of its intent. *Id.*, at 138, 71 S.Ct., at 155. Although all of the cases decided by this Court under *Feres* have involved allegations of negligence on the part of members of the military, this Court has never suggested that the military status of the alleged tortfeasor is crucial to the application of the doctrine. Nor have lower courts understood this fact to be relevant under *Feres*. Instead, the *Feres* doctrine has been applied consistently to bar all suits on behalf of service members against the government based upon service-related injuries. We decline to modify the doctrine at this late date.



A

This Court has emphasized three broad rationales underlying the *Feres* decision. See *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-673, 97 S.Ct. 2054, 2057-2058, 52 L.Ed.2d 665 (1977), and n.2, *supra*. An examination of these reasons for the doctrine demonstrates that the status of the alleged tortfeasor does not have the critical significance ascribed to it by the Court of Appeals in this case. First, “[t]he relationship between the government and members of its armed forces is ‘distinctly federal in character.’ ” *Feres*, 340 U.S., at 143, 71 S.Ct., at 158 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 305, 67 S.Ct. 1604, 1606, 91 L.Ed. 2067 (1947)). This federal relationship is implicated to the greatest degree when a service member is performing activities incident to his federal service. Performance of the military function in diverse parts of the country and the world entails a “[s]ignificant risk of accidents and injuries.” *Stencel Aero Engineering Corp. v. United States*, *supra*, 431 U.S., at 672, 97 S.Ct., at 2058. Where a service member is injured incident to service--that is, because of his military relationship to the government--it “makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the government to [the] serviceman.” *Ibid.* Instead, application of the underlying federal remedy that provides “simple, certain, and uniform compensation for injuries or death of those in armed services,” *Feres*, *supra*, 340 U.S., at 144, 71 S.Ct., at 158 (footnote omitted), is appropriate.

Second, the existence of these generous statutory disability and death benefits is an independent reason why the *Feres* doctrine bars suit for service-related injuries. In *Feres*, the Court observed that the primary purpose of the FTCA “was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional.” 340 U.S., at 140, 71 S.Ct., at 156. Those injured during the course of activity incident to service not only receive benefits that “compare extremely favorably with those provided by most workmen’s compensation statutes,” *Id.*, at 145, 71 S.Ct., at 159, but the recovery of benefits is “swift [and] efficient,” *Stencel Aero Engineering Corp. v. United States*, *supra*, 431 U.S., at 673, 97 S.Ct., at 2058, “normally requir[ing] no litigation,” *Feres*, *supra*, 340 U.S., at 145, 71 S.Ct., at 159. The Court in *Feres* found it difficult to believe that Congress would have provided such a comprehensive system of benefits while at the same time contemplating recovery for service-related injuries under the FTCA. Particularly persuasive was the fact that Congress “omitted any provision to adjust these two types of remedy to each other.” *Id.*, at 144, 71 S.Ct., at 158. Congress still has not amended the Veterans’ Benefits Act or the FTCA to make any such provision for injuries incurred during the course of activity incident to service. We thus find no reason to modify what the Court has previously found to be the law: the statutory veterans’ benefits “provid[e] an upper limit of liability for the government as to service-connected injuries. *Stencel Aero Engineering Corp. v. United*

*States, supra*, 431 U.S., at 673, 97 S.Ct., at 2059. See *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 464, 100 S.Ct. 647, 650, 62 L.Ed.2d 614 (1980) (*per curiam*) (“[T]he Veterans’ Benefits Act provided compensation to injured servicemen, which we understood Congress intended to be the sole remedy for service-connected injuries”).

Third, *Feres* and its progeny indicate that suits brought by service members against the government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the “type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.” *United States v. Shearer*, 473 U.S., at 59, 105 S.Ct., at 3044 (emphasis in original). In every respect the military is, as this Court has recognized, “a specialized society.” *Parker v. Levy*, 417 U.S. 733, 743, 94 S.Ct. 2547, 2555, 41 L.Ed.2d 439 (1974). “[T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.” *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission. Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one’s service and to one’s country. Suits brought by service members against the government for service-related injuries could undermine the commitment essential to

effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.

## B

In this case, Lieutenant Commander Johnson was killed while performing a rescue mission on the high seas, a primary duty of the Coast Guard. See 14 U.S.C. §§ 2, 88(a)(1). There is no dispute that Johnson's injury arose directly out of the rescue mission, or that the mission was an activity incident to his military service. Johnson went on the rescue mission specifically because of his military status. His wife received and is continuing to receive statutory benefits on account of his death. Because Johnson was acting pursuant to standard operating procedures of the Coast Guard, the potential that this suit could implicate military discipline is substantial. The circumstances of this case thus fall within the heart of the *Feres* doctrine as it consistently has been articulated.

## III

We affirm the holding of *Feres* that "the government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S., at 146, 71 S.Ct. at 159. Accordingly, we reverse the judgment of the Court of Appeals for the Eleventh Circuit and remand for proceedings consistent with this opinion.

It is so ordered.

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Justices Brennan, Marshall, and Stevens joined Justice Scalia in an often-cited and powerful dissent to *Johnson*. The dissent stopped just short of advocating a total reversal of *Feres*, although it described that case as “our clearly wrong decision in *Feres*.”<sup>30</sup> Despite this dissent, the circuit courts have continued to apply the *Johnson* analysis.<sup>31</sup>

The *Feres* doctrine also extends to National Guardsmen when engaged in guard activities,<sup>32</sup> service academy cadets,<sup>33, 34</sup> Public Health Service officers,<sup>35</sup> foreign military members in the United States training with U.S. forces,<sup>36</sup> and service members on the

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<sup>30</sup> *United States v. Johnson*, 481 U.S. 681, 703 (1987).

<sup>31</sup> See, e.g., *Borden v. Veterans Admin.*, 41 F.3d 763 (1st Cir. 1994) (medical treatment in MTF invokes *Feres*); *Stephenson v. Stone*, 21 F.3d 159 (7th Cir. 1994) (soldier murdered by NCO in barracks); *Jackson v. Brigle*, 17 F.3d 280 (9th Cir. 1994), *cert. denied*, 513 U.S. 868 (1994); *Hayes v. United States*, 44 F.3d 377 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 66 (1996) (finding death from medical malpractice during elective surgery is *Feres* barred); *Lauer v. United States*, 968 F.2d 1428 (1st Cir. 1992), *cert. denied*, 506 U.S. 1033 (1992) (sailor struck by GOV while walking on off-base access road maintained and patrolled by Navy is barred); *Kitowski v. United States*, 931 F.2d 1526 (11th Cir. 1991), *cert. denied*, 502 U.S. 938 (1991) (*Feres* applies to deliberate drowning of Navy trainee by instructors during training).

<sup>32</sup> *Quintana v. United States*, 997 F.2d 711 (10th Cir. 1993); *Duffy v. United States*, 966 F.2d 307 (7th Cir. 1992); *Loughney v. United States*, 839 F.2d 186 (3d Cir. 1988); *Henry v. Textron, Inc.*, 577 F.2d 1163 (4th Cir.), *cert. denied*, 439 U.S. 1047 (1978); *Misko v. United States*, 453 F. Supp. 513 (D. D.C. 1978). See also H.R. Rep. No. 384, 97th Cong., 1st Sess. 5 (1981).

<sup>33</sup> *Miller v. United States*, 42 F.3d 297 (5th Cir. 1995); *Collins v. United States*, 642 F.2d 217 (7th Cir. 1981); *Archer v. United States*, 217 F.2d 545 (9th Cir. 1954), *cert. denied*, 348 U.S. 953 (1955).

<sup>34</sup> The bar has also been applied to ROTC cadets. See, *Wake v. United States*, 89 F.3d 53 (2d Cir. 1996) (Noting that the *Feres* bar applies to individuals on reserve status, as well as to cadets in U.S. military academies, the court found that a member of the U.S. Navy Reserve Officers Training Corps (NROTC) was barred by *Feres* from pursuing a claim for injuries suffered when returning from a flight physical examination).

<sup>35</sup> *Scheppan v. United States*, 810 F.2d 461 (4th Cir. 1987).

<sup>36</sup> *Doberkow v. United States*, 581 F.2d 785 (9th Cir. 1978).

Temporary Disability Retired List.<sup>37</sup> *Feres* does not bar the tort claims of military veterans if the tortious act occurred after the claimant left military duty.<sup>38</sup> The key issue is whether the alleged injury is separate and distinct from any acts before discharge.<sup>39</sup> This exception allows veterans receiving treatment in a military medical facility to claim under the FTCA for malpractice.

Another post-discharge tort theory enables claimants to avoid a *Feres* bar based on the government's failure to warn persons of dangerous conditions caused by government actions. This theory is limited to intentional acts by military superiors that expose service members to a risk of harm after discharge, about which the government negligently fails to warn the service member.<sup>40</sup> If the failure to warn is but a continuation of a duty that arose while the individual was on active duty, or was created by negligent, as opposed to intentional acts, the claim is barred.<sup>41</sup> There is also no "federal" common law liability for failure to warn if the cause of action does not exist under state law.<sup>42</sup>

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<sup>37</sup> *Ricks v. United States*, 842 F.2d 300 (11th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1988). *Contra Cortez v. United States*, 854 F.2d 723 (5th Cir. 1988); *Rinelli v. United States*, 706 F. Supp. 190 (E.D. N.Y. 1988).

<sup>38</sup> *United States v. Brown*, 348 U.S. 110 (1954); *McGowan v. Scoggins*, 890 F.2d 128 (9th Cir. 1989) (*Feres* not applicable to assault on retired officer seeking new ID card).

<sup>39</sup> *United States v. Stanley*, 483 U.S. 669 (1987) (No); *M.M.H. v. United States*, 966 F.2d 285 (7th Cir. 1992) (Yes).

<sup>40</sup> *Cole v. United States*, 755 F.2d 873 (11th Cir. 1985) (failure to warn of increased risk of cancer after exposure to high levels of radiation); *Thornwell v. United States*, 471 F. Supp. 344 (D. D.C. 1979) (soldier given LSD without his knowledge while on active duty and after discharge Army negligently failed to warn him of medical risks or to provide needed medical follow-up).

<sup>41</sup> *In Re Agent Orange Product Liability Litigation*, 580 F. Supp. 1242 (E.D.N.Y. 1984); *Sweet v. United States*, 528 F. Supp. 1068 (D.S.D. 1981), *aff'd*, 687 F.2d 246 (1982).

<sup>42</sup> *Cole v. United States*, 846 F.2d 1290 (11th Cir.), *cert. denied*, 488 U.S. 966 (1988).

## D. DERIVATIVE CLAIMS

*Feres* does not bar claims by spouses or dependents who are personally injured by government negligence, regardless of the situs of the injury (medical facilities, recreation areas, etc.).<sup>43</sup> *Feres* will generally bar any claim arising out of a soldier's injuries that are incident to service, however.<sup>44</sup> For example, if a soldier acting incident to service and his spouse are injured in an automobile accident due to the negligence of another government driver, either the service member (if state law allows) or the spouse may assert an FTCA claim for losses stemming from the spouse's injuries. Neither party, however, may assert a claim for losses arising from the service member's injuries.

One of the more confusing and controversial applications of the *Feres* bar involves injuries to an unborn fetus. The circuits have split on whether a claim is *Feres* barred as a derivative claim for treatment of the service member mother<sup>45</sup> or valid as an independent right of action for the child.<sup>46</sup>

Similar to derivative claims of dependents are claims for indemnity or contribution for injuries to service members incident to service. In *Stencel Aero*

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<sup>43</sup> *Portis v. United States*, 483 F.2d 670 (4th Cir. 1973). The soldier can also recover on a derivative claim for injuries to family members. *Phillips v. United States*, 508 F. Supp. 544 (D.S.C 1981).

<sup>44</sup> *Grosinsky v. United States*, 947 F.2d 417 (9th Cir. 1991).

<sup>45</sup> *Scales v. United States*, 685 F.2d 970 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

<sup>46</sup> *Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987); *Romero by Romero v. United States*, 954 F.2d 223 (4th Cir. 1992), *aff'd*, 2 F.3d 1149 (1993).

*Engineering Corp. v. United States*,<sup>47</sup> the Supreme Court applied a “genesis test” and held that the *Feres* doctrine bars third party claims for contribution and indemnity when the plaintiff in the primary action was barred by the incident to service rule from recovery directly from the United States.<sup>48</sup>

## E. OTHER CLAIMANTS

The Anti-Assignment Act prevents assignment of a claim against the United States before the claim is approved and a payment warrant issued.<sup>49</sup> The Act only applies, however, to consensual transactions and not to transfer of rights by operation of law. Claims subrogated by operation of law, such as the claim of an insurance carrier who has paid the injured party, are valid under the FTCA.<sup>50</sup>

The United States is also liable for contribution as a joint tortfeasor to a co-defendant if local law allows.<sup>51</sup> *Feres* will not bar an indemnity claim when the negligence of the United States, and not a co-defendant’s negligence, would give rise to

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<sup>47</sup> 431 U.S. 666 (1977).

<sup>48</sup> See also *Boyle v. United States*, 487 U.S. 500 (1988), *cert. denied*, 488 U.S. 994 (1988) (discussing scope of application of government contractor defense); *Hercules Inc. v. United States*, 24 F.3d 188 (Fed. Cir. 1994), *aff’d*, 116 S.Ct. 981 (1996) (finding government contractor defense inapplicable to settlement by Agent Orange manufacturers with plaintiffs).

<sup>49</sup> 31 U.S.C. § 3727 (1994).

<sup>50</sup> *United States v. Shannon*, 342 U.S. 288 (1952); *United States v. Aetna Casualty Surety Co.*, 338 U.S. 366 (1949).

<sup>51</sup> *Rayonier v. United States*, 352 U.S. 315 (1957); *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951); *Williams v. United States*, 352 F.2d 477 (5th Cir. 1968); *Johns-Manville Sales Corp. v. United States*, 690 F.2d 721 (9th Cir. 1982) (claimant must receive final judgment and then meet administrative filing requirements).



an obligation of complete indemnity under local law.<sup>52</sup> For purposes of the statute of limitations, the claim against the United States does not accrue until the date that the right to contribution or indemnity becomes assertable.<sup>53</sup>

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<sup>52</sup> *United Airlines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964); *Hankinson v. Pennsylvania R.R.*, 280 F.2d 249 (3d Cir. 1960); *Chicago, R.I. & P. Ry. v. United States*, 220 F.2d 939 (7th Cir. 1955).

<sup>53</sup> *Chicago, R.I. & P. Ry. v. United States*, 220 F.2d 939 (7th Cir. 1955); *Keleket X-Ray Corp. v. United States*, 275 F.2d 167 (D.C. Cir. 1960).

## CHAPTER IV. THE FTCA CAUSE OF ACTION

Once an FTCA claimant has satisfied the administrative filing requirements, Title 28 U.S.C. § 1346(b) gives the federal courts:

exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after 1 January 1945, for injury or loss of property, personal injury or death caused by negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Federal courts have extensively scrutinized several portions of this statutory language over the last four decades, while other portions of the law have posed few interpretive problems.

### **A. "MONEY DAMAGES . . . FOR INJURY OR LOSS OF PROPERTY, OR PERSONAL INJURY OR DEATH"**

This language waives government immunity only for claims sounding in tort, and limits government liability to money damages.<sup>1</sup> The line between tort and contract causes of actions is sometimes unclear, but the general rule is that a court will reject an FTCA

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<sup>1</sup> *People v. United States*, 307 F.2d 941 (9th Cir. 1962), *cert. denied*, 372 U.S. 941 (1963); *Ryan v. Cleland*, 531 F. Supp. 724 (E.D.N.Y. 1982).

claim that stems primarily from the failure of a government contractual arrangement.<sup>2</sup> Courts will likewise deny requests for restitution and injunctive or declaratory relief.<sup>3</sup>

## B. "NEGLIGENT OR WRONGFUL ACT OR OMISSION"

The United States is liable under the FTCA for damages arising from acts or omissions considered tortious under controlling state law.<sup>4</sup> The substantive law of the state determines whether the plaintiff has a valid cause of action.<sup>5</sup> FTCA cases have applied state laws of *res ipsa loquitur*,<sup>6</sup> attractive nuisance,<sup>7</sup> last clear chance,<sup>8</sup> proximate cause,<sup>9</sup> and local statutory rules such as safe place statutes,<sup>10</sup> recreational use laws,<sup>11</sup> and

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<sup>2</sup> See, e.g., *Woodbury v. United States*, 313 F.2d 291 (9th Cir. 1963); *Aluetco Corp. v. United States*, 244 F.2d 674 (3d Cir. 1957); *Martin v. United States*, 649 F.2d 701 (9th Cir. 1981).

<sup>3</sup> *Pauling v. McElroy*, 278 F.2d 252 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 835 (1960).

<sup>4</sup> 28 U.S.C. §§ 1346(b), 2672 (1994). *Klett v. Pim*, 965 F.2d 587 (8th Cir. 1992) (refusal by FmHA to grant farmer an operating loan is not a state tort).

<sup>5</sup> *Henderson v. United States*, 846 F.2d 1233 (9th Cir. 1988).

<sup>6</sup> *Simpson v. United States*, 454 F.2d 691 (6th Cir. 1972); *Buchanan v. United States*, 305 F.2d 738 (8th Cir. 1962); *United States v. Johnson*, 288 F.2d 40 (5th Cir. 1961); *O'Connor v. United States*, 251 F.2d 939 (2d Cir. 1958).

<sup>7</sup> *Epling v. United States*, 453 F.2d 327 (9th Cir. 1971).

<sup>8</sup> *Peck v. United States*, 195 F.2d 686 (4th Cir. 1952). See generally JAYSON, *HANDLING FEDERAL TORT CLAIMS*, § 9.05, (1998).

<sup>9</sup> *Castillo v. United States*, 552 F.2d 1385 (10th Cir. 1977); *Dickens v. United States*, 545 F.2d 886 (5th Cir. 1977).

<sup>10</sup> *American Exchange Bank of Madison v. United States*, 257 F.2d 938 (7th Cir. 1958).

<sup>11</sup> *Hegg v. United States*, 817 F.2d 1328 (8th Cir. 1987).

scaffolding acts,<sup>12</sup> to define negligent or wrongful government conduct. The FTCA does not, however, permit recovery under a theory of strict or absolute liability. In *Laird v. Nelms*,<sup>13</sup> for example, a sonic boom from an Air Force jet damaged the plaintiff's home. North Carolina allowed recovery under a theory of absolute liability based on ultra hazardous activity. In reversing the lower court decision, the Supreme Court held that North Carolina's rule of strict liability was irrelevant because the FTCA required some negligent or wrongful act by a government employee as the basis of liability. The damage caused by the sonic boom was not negligently caused, so the plaintiff was not entitled to recover.

### C. "EMPLOYEE OF THE GOVERNMENT"

Activities of the United States are conducted by individuals; therefore, United States tort liability is always derivative.<sup>14</sup> The FTCA makes the United States liable for the torts of an "employee of the government." Title 28 U.S.C. § 2671 defines "employee" as:

Officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under sections 316, 502, 503, 504, or 505 of title 32, U.S.C. and persons acting on behalf of a federal agency in an

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<sup>12</sup> *Schmid v. United States*, 273 F.2d 172 (7th Cir. 1959).

<sup>13</sup> 406 U.S. 797 (1972), *reh'g denied*, 409 U.S. 902 (1972).

<sup>14</sup> *Schmid v. United States*, 273 F.2d 172 (7th Cir. 1959).

official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.<sup>15</sup>

A “federal agency” includes: “the executive departments and independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States.”<sup>16</sup>

In most FTCA cases, the status of the tortfeasor as a government employee is undisputed. Several recurring situations, however, are worth considering.

1. Employees of nonappropriated fund instrumentalities (NAFIs).<sup>17</sup>

Some confusion has arisen over the torts of nonappropriated fund employees. Active duty service members assigned to duty with nonappropriated fund entities retain their status as federal employees for purposes of FTCA liability.<sup>18</sup> The courts also impose FTCA liability for the torts of employees paid by the NAFI itself.<sup>19</sup> There is, however, a distinction between employees and members of certain NAFIs; the United States will be liable for torts committed by employees, but not for those committed by

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<sup>15</sup> 28 U.S.C. § 2671 (1994).

<sup>16</sup> *Id.*

<sup>17</sup> For a definition of nonappropriated fund instrumentalities, *see* AR 215-1, NONAPPROPRIATED FUND INSTRUMENTALITIES AND MORALE, WELFARE, AND RECREATION ACTIVITIES (29 September 1995).

<sup>18</sup> *Mariano v. United States*, 444 F. Supp. 316 (E.D. VA, 1977), *aff'd*, 605 F.2d 721 (4th Cir. 1979); *Roger v. Elrod*, 125 F. Supp. 62 (D. Alaska 1952).

<sup>19</sup> *Gonzales v. United States*, 589 F. 2d 465 (9th Cir. 1979); *Rizzuto v. United States*, 298 F.2d 748 (10th Cir. 1961); *United States v. Holcombe*, 277 F.2d 143 (4th Cir. 1960).

mere members.<sup>20</sup> The United States is also not liable for the acts of private organizations on military installations, nor the acts of their employees.<sup>21</sup>

## 2. Independent contractors.

The FTCA excludes government liability for the acts of independent contractors. Much of the government's construction and manufacturing work is performed pursuant to contracts with private enterprise. Quite often the work is performed on government property where federal employees have contract supervision or liaison responsibilities with the contractor. The employee typically receives workers' compensation for injuries suffered in the course of employment, which is the employee's exclusive remedy against the employer. Many injured employees consider workers' compensation an inadequate remedy and look to the United States as an additional, deep-pocket source of revenue.

The FTCA waives the sovereign immunity of the United States only for acts of "employees" of a "federal agency." 28 U.S.C. § 2671 excludes from the definition of agency "any contractor with the United States." Neither the acts of the contractor nor its employees may, therefore, impose liability on the United States under the FTCA. In practice, however, courts have limited the "contractor" language to the "independent

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<sup>20</sup> To encourage participation in NAFI activities, claims that arise from the use of certain types of NAFI property, *i.e.*, flying clubs, golf clubs, and craft shops, are paid even though the user is not an employee as defined by the FTCA. These claims are paid under AR 27-20, chapter 12, from NAFI funds.

<sup>21</sup> See *Scott v. United States*, 337 F.2d 471 (5th Cir. 1964), *cert. denied*, 380 U.S. 933 (1965). For a definition of private organizations, see AR 210-1, PRIVATE ORGANIZATIONS ON DEPARTMENT OF THE ARMY INSTALLATIONS AND OFFICIAL PARTICIPATION IN PRIVATE ORGANIZATIONS (14 September 1990).

contractor” test derived from the law of agency.<sup>22</sup> While many factors determine who is an employee (for whose negligence the United States might be liable) and who is an independent contractor (for whose negligence the government is not liable), the most significant test is government control over the contractor.<sup>23</sup>

Certain relationships between a private business and the government may involve dual capacity. One individual may be “employed” with separate responsibilities as an independent contractor and as an employee.<sup>24</sup> A second situation might involve differing degrees of government control over separate aspects of the same job.<sup>25</sup> In each situation the claims officer must isolate the portion of work out of which the claim arose. If an employer-employee relationship is present, the government may be held liable. If the injury was caused by an independent contractor, the government is not liable.

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<sup>22</sup> RESTATEMENT (SECOND) OF AGENCY § 220, (1958): “Definition of a servant. (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right of control. (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) method of payment, whether by the time or by the job; (h) whether or not the parties believe they are creating the relationship of master and servant; and (j) whether the principal is or is not in business.”

<sup>23</sup> *Williams v. United States*, 50 F.3d 299 (4th Cir. 1995) (U.S. government was not liable for actions of contract janitorial service employees in building leased by the United States); *Berkman v. United States*, 957 F.2d 108 (4th Cir. 1992) (operator of mobile lounge at Dulles Airport is not U.S. employee, but independent contractor); *Bird v. United States*, 949 F.2d 1079 (10th Cir. 1991) (nurse anesthetist hired from placement service to serve in a federal hospital was a federal employee); *Leone v. United States*, 910 F.2d 46 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (private physicians designated as Aviation Medical Examiners by the Federal Aviation Administration are not federal employees); *United States v. Orleans*, 425 U.S. 807 (1976); *Logue v. United States*, 412 U.S. 521 (1973); *Brooks v. A.R. & S. Enterprises*, 622 F.2d 8 (1st Cir. 1980); *Smith v. United States* 688 F.2d 476 (7th Cir. 1982).

<sup>24</sup> *Marcum v. United States*, 324 F.2d 787 (6th Cir. 1963).

<sup>25</sup> *Maloof v. United States*, 242 F. Supp. 175 (D. Md. 1965).

Three issues that often arise in contractor cases deserve closer examination.

a. Government employees' negligence. A specific job performed by an independent contractor does not excuse federal liability under the FTCA for torts committed by government employees during the performance of the contractor. Government contracting officers, supervising engineers, safety directors, inspectors, and others perform federal functions during the performance of most contracts. The United States may be liable for negligent direction of contractor personnel,<sup>26</sup> the provision of dangerous implements for conduct of work,<sup>27</sup> or failure to provide a safe place for the contractor's employees to work.<sup>28</sup>

b. Exercise of control. The Supreme Court in *United States v. Logue*<sup>29</sup> indicated the significance of the exercise of control in deciding contractor cases. In *Logue* a federal prisoner was placed in a county jail pursuant to a contractual arrangement. The prisoner committed suicide during a period of negligent supervision by the county jailers. The Court refused to hold the United States liable for the negligence

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<sup>26</sup> *Hardaway v. U.S. Corps of Engineers*, 980 F.2d 1415 (11th Cir. 1992), *cert. denied*, 510 U.S. 820 (1993) (failure to investigate financial worth of contract and require posting of Miller Act bond in violation of COE regulation is not a state tort); *United States v. Babbs*, 483 F.2d 308 (9th Cir. 1973); *Anderson v. United States*, 259 F. Supp. 148 (E.D. Pa. 1966).

<sup>27</sup> *Flynn v. United States*, 631 F.2d 678 (10th Cir. 1980); *Benson v. United States*, 150 F. Supp. 610 (N.D. Cal. 1957).

<sup>28</sup> *Wiseman v. United States*, 327 F.2d 701 (3d Cir. 1964); *Tatum v. United States*, 499 F. Supp. 1105 (M.D. Ala. 1980).

<sup>29</sup> 412 U.S. 521 (1973). *See also* *Brown v. United States*, 486 F.2d 284 (8th Cir. 1973).



of the county jailers. Federal employees did not control the day-to-day activities of the jail; therefore, the jail was an independent contractor.

Many claimants have successfully attempted to show that the exercise or right to exercise some government control is sufficient to show federal liability.<sup>30</sup> A contract reservation that contractor personnel meet certain qualifications is also generally insufficient to establish government control.<sup>31</sup> Promulgation and enforcement of government safety regulations also do not constitute sufficient government control.<sup>32</sup> Detailed and extensive instructions in performing work may, however, amount to government control and overcome an independent contractor's status.<sup>33</sup>

c. Nondelegable duty. Under agency law, a principal may not avoid liability for a breach of a "nondelegable duty" by hiring an independent contractor to perform the work.<sup>34</sup> The degree of control by the principal is irrelevant. Such nondelegable duties typically arise from the performance of inherently dangerous

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<sup>30</sup> See, e.g., *Berkman v. United States*, 957 F.2d 108 (4th Cir. 1992) (insufficient U.S. control over operator of mobile lounge at Dulles Airport); *Cavasos v. United States*, 776 F.2d 1263 (5th Cir. 1985).

<sup>31</sup> *Buchanan v. United States*, 305 F.2d 738 (8th Cir. 1962); *Dushon v. United States*, 243 F.2d 451 (9th Cir. 1957).

<sup>32</sup> *Lathers v. Penguin Indus. Inc.*, 687 F.2d 69 (5th Cir. 1982); *Campbell v. United States*, 493 F.2d 1000 (9th Cir. 1974); *United States v. Page*, 350 F.2d 28 (10th Cir. 1965), *cert. denied*, 382 U.S. 979 (1966).

<sup>33</sup> *Maryland ex rel. Pumphrey v. Manor Real Estate & Trust Co.*, 176 F.2d 414 (4th Cir. 1949); *Schetter v. Housing Authority*, 132 F. Supp. 149 (W.D. Pa. 1955).

<sup>34</sup> RESTATEMENT (SECOND) OF AGENCY § 214 (1958); PROSSER, HANDBOOK ON THE LAW OF TORTS 470 (4th ed. 1971).

activities or from the manner in which buildings and grounds are maintained.<sup>35</sup> The FTCA requirement of a negligent or wrongful act by a government employee,<sup>36</sup> however, supersedes state law requirements that equate to strict liability against the United States.<sup>37</sup> Seldom will liability be imposed upon the United States without proof of a negligent or wrongful act by a government employee.<sup>38</sup>

#### **D. "ACTING WITHIN THE SCOPE OF HIS OFFICE OR EMPLOYMENT"**

The FTCA imposes liability on the government only for negligent acts by employees who are acting within the scope of their employment. The "scope of employment" clause is the "very heart and substance" of the FTCA. Its inclusion as one of the elements of an FTCA cause of action demonstrates clear Congressional intent to limit the liability of the United States under the doctrine of *respondeat superior*.<sup>39</sup> While

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<sup>35</sup> *Dickerson Inc. v. United States*, 875 F.2d 1577 (11th Cir. 1989) (Florida nondelegable duty statute applied to PCB disposal); *Campbell v. United States*, 493 F.2d 1000 (9th Cir. 1974) (state does not recognize extrahazardous doctrine); *Jeffries v. United States*, 477 F.2d 52 (9th Cir. 1973); *Sexton v. United States*, 797 F. Supp. 1292 (E.D. N. Car. 1991) (U.S. owed nondelegable duty to warn employee of subcontractor of danger of weak door in metal grate); *Orr v. United States*, 486 F.2d 270 (5th Cir. 1973); *Emelwon Inc. v. United States*, 391 F.2d 9 (5th Cir. 1968), *cert. denied*, 393 U.S. 841 (1968); *Stancil v. United States*, 196 F. Supp. 478 (E.D. Va. 1961).

<sup>36</sup> 28 U.S.C. § 2671; *Laird v. Nelms*, 406 U.S. 797 (1972), *reh'g denied*, 409 U.S. 902 (1972).

<sup>37</sup> *Savic v. United States*, 918 F.2d 696 (7th Cir. 1990), *cert. denied*, 502 U.S. 813 (1991) (no U.S. employee in charge of work leads to no FTCA liability); *Thorne v. United States*, 479 F.2d 804 (9th Cir. 1973); *Emelwon, Inc. v. United States*, 391 F.2d 9 (5th Cir. 1968), *cert. denied*, 393 U.S. 841 (1968); *Fried v. United States*, 579 F. Supp. 1212 (N.D. Ill. 1983).

<sup>38</sup> *See, e.g., Logue v. United States*, 412 U.S. 521 (1973) (rejecting the nondelegable duty concept of liability in the absence of a negligent act by a government employee).

<sup>39</sup> *United States v. Campbell*, 172 F.2d 500 (5th Cir. 1949), *cert. denied*, 337 U.S. 957 (1949).

federal law controls the question of whether someone is “an employee of the government,” a 1955 Supreme Court decision held that scope of employment issues are decided under “the law of the place where the act or omission occurred.”<sup>40</sup> State law, therefore, governs the scope of employment question. Consequently, the outcome of cases with similar facts may vary considerably from jurisdiction to jurisdiction.

The law on the scope of employment varies from state to state, but the issue usually turns on: (1) control exercised by the employer over its employee, and (2) the degree to which the employer’s purposes are being served at the time of the incident.<sup>41</sup> The FTCA defines “scope of employment” for military personnel as “acting in the line of duty,”<sup>42</sup> which dictates certain benefits payable to an injured or killed service member. These benefits can accrue, however, even though the injury, death, or disease results from a purely personal pursuit. Courts have rejected this expansive definition; whether the negligent actor is military or civilian, an FTCA plaintiff must prove the same “scope of employment” and not simply that the soldier was acting within the “line of duty.”<sup>43</sup>

Three particularly common and troublesome “scope of employment” issues concern intentional wrongful conduct, use of government vehicles, and off-duty personal activities governed by military regulations.

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<sup>40</sup> *Williams v. United States*, 350 U.S. 857 (1955); *see also* *Haddon v. United States*, 68 F.3d 1420 (D.C. Cir. 1995); *Hallett v. United States*, 877 F. Supp. 1423 (D. Nev. 1995); *Hall v. Green*, 8 F.3d 695 (9th Cir. 1993), *cert. denied*, 513 U.S. 809 (1994); *Flechsig v. United States*, 991 F.2d 300 (6th Cir. 1993); *Forrest City Machine Works, Inc. v. United States*, 953 F.2d 1086 (8th Cir. 1992); *Kelly v. United States*, 924 F.2d 355 (1st Cir. 1991).

<sup>41</sup> *See generally* RESTATEMENT, (SECOND) OF AGENCY §§ 228, 229 (1958); PROSSER AND KEETON, HANDBOOK ON THE LAW OF TORTS 460 (7th Ed. 1989).

<sup>42</sup> 28 U.S.C. § 2671 (1994).

<sup>43</sup> *Williams v. United States*, 350 U.S. 857 (1955); *Hartzell v. United States*, 786 F.2d 964 (9th Cir. 1986).

## 1. Intentional wrongful conduct.

Intentional wrongful conduct on the part of an employee does not preclude a finding that the employee was acting within the scope of employment. If, at the time of the incident giving rise to the claim, the employee was performing the employer's work rather than acting out of personal motives unrelated to the furtherance of the employer's business, the employee's acts, even if intentionally wrongful, are within the scope of employment.<sup>44</sup> If, however, the employee's acts are so outrageous, criminal, and far removed from the government's business that the acts could not reasonably have arisen from the performance of duty, the intentional misconduct will not be considered within the scope of employment, even though it occurs concurrent with other duty functions.<sup>45</sup>

## 2. Use of government vehicles.

The scope of employment question often arises in the military in cases involving the use of vehicles. Since the scope of employment turns on state law principles, courts have reached very different results in factually similar cases. Though the cases defy

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<sup>44</sup> See, e.g., *Williams v. United States*, 71 F.3d 502 (5th Cir. 1995) (defamatory remarks made by Congressman during an interview within the scope of employment); *Red Elk v. United States*, 62 F.3d 1102 (8th Cir. 1995) (rape perpetrated by a police officer transporting a curfew violator to her home within the scope of employment); *Tonelli v. United States*, 60 F.3d 492 (8th Cir. 1995) (postal worker's actions in opening and pilfering first class mail in violation of federal law and post office procedures within the scope of employment).

<sup>45</sup> *Bates v. United States*, 517 F. Supp. 1350 (1981), *aff'd*, 701 F.2d 737 (8th Cir. 1983) (military policeman's actions in kidnapping four teenagers, raping two, murdering three, and attempting to murder the fourth while on duty were not within the scope of employment because conduct was so outrageous, criminal, and excessively violent that it could not reasonably have arisen from the performance of his duty).

reconciliation because of the different legal principles governing different jurisdiction, many common arguments arise during their presentation.

a. Government-owned vehicles. Many states follow the rule that in an action caused by the negligent operation of a motor vehicle, proof that the defendant employer owned the vehicle in question establishes a *prima facie* case that the vehicle was being operated within the scope of employment. This presumption, however, is rebuttable,<sup>46</sup> and often fails if the employee's actions while using the vehicle were purely personal in nature.

Similarly, when a government vehicle is taken without permission, the driver is almost universally held to have been acting outside of the scope of employment. Since a vehicle taken without permission is usually taken for purely personal motives, the driver's "mission" has no connection with government business. The driver's status is, therefore, that of a mere borrower. A master-servant relationship does not exist with respect to the use. Consequently, the government is not liable for its employees actions

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<sup>46</sup> Keener v. Department of the Army, 498 F. Supp. 1309 (M.D. Pa. 1980), *aff'd*, 659 F.2d 1068 (3d. Cir. 1981) (presumption rebutted-Army sergeant using a government vehicle to get something to eat); Simpson v. United States, 484 F. Supp. 387 (W.D. Pa. 1980) (applying Pennsylvania law - presumption not rebutted); Erwin v. United States, 445 F.2d 1035 (10th Cir. 1971), *cert. denied*, 404 U.S. 992 (1971) (presumption rebutted - VISTA employee using a government vehicle to drive to the airport to catch a plane for vacation (Oklahoma law)); Pacheco v. United States, 409 F.2d 1234 (3d Cir. 1969) (applying Virgin Islands law - directed verdict for United States reversed because proof of government ownership of truck raised a presumption that driver was acting within scope); Hardy v. United States, 304 F. Supp. 855 (N.D. Ga. 1969) (applying Georgia law - government summary judgment request denied because of presumption); Tomack v. United States, 369 F.2d 350 (2d Cir. 1966) (presumption rebutted - Small Business Administration employee using an agency car to attend a relative's funeral (New York law)); Baker v. United States, 159 F. Supp. 925 (D.D.C. 1958), *aff'd*, 265 F.2d 123 (D.C. Cir. 1959) (presumption not rebutted - service member using Army vehicle to get a haircut).

under such circumstances.<sup>47</sup> If, however, the government is negligent in exercising custody over its vehicles, or entrusts or dispatches a vehicle to an employee when it is foreseeable that the employee may take the vehicle for a personal purpose, the United States could be liable under the FTCA for injuries or deaths arising from the unauthorized use of the vehicle. If the act of entrustment or dispatch is itself outside of the scope of employment, the United States is not liable.

When a government vehicle is taken with permission, but used by the driver on a personal frolic, the United States will normally concede that the vehicle was properly dispatched for government purposes. Nevertheless, the United States will argue that the driver made a detour or deviation that rendered the vehicle's use outside of the scope of employment. Here, more than in any other category of "scope of employment" cases, the outcome is highly dependent on local law and the particular facts of a given situation. Two cases are illustrative of the different outcomes possible.

In *Fitzpatrick v. United States*,<sup>48</sup> the tortfeasor, SFC Davis, was assigned to Fort Meade, Maryland. As senior medical sergeant, his duties included traveling to Delaware to train National Guard units in the proper operation of a military medical unit. For such

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<sup>47</sup> *Coto Orbeta v. United States*, 770 F. Supp. 54 (D.P.R. 1991) (service member took a government vehicle and drove home upon learning that his wife had been involved in an accident - nonscope); *White v. Hardy*, 678 F.2d 485 (4th Cir. 1982) (service member on 24-hour duty took a government vehicle without permission and left the command post to make a personal telephone call, staying away for several hours - nonscope); *Concepcion v. United States*, 374 F. Supp. 1391 (D. Guam 1974) (off-duty service member drove another service member on a personal errand in a government vehicle which the former normally used for duty purposes - nonscope); *LeFerve v. United States*, 362 F.2d 352 (5th Cir. 1966) (National Guardsman dispatched a government owned jeep to himself to retrieve a sunken boat for his personal use - nonscope).

<sup>48</sup> 754 F. Supp. 1023 (D. Del. 1991).

travel, SFC Davis was given a government vehicle and was authorized to make his own arrangements for food and lodging.

On one trip, SFC Davis arrived in Delaware, rented a motel room, and then went to the training location to look for the training NCO. Unable to locate the training NCO, SFC Davis went to the officer's club to find the unit executive officer. The executive officer was not at the club. Nevertheless, SFC Davis stayed for approximately three and a half hours. During this time he had several drinks, socialized, and played pool. After leaving the club and while driving back to his motel, SFC Davis rear-ended a car stopped at a traffic light. He was subsequently arrested and charged with Driving Under the Influence of Alcohol.

Applying Delaware law, the District Court held that SFC Davis was within the scope of his employment at the time of the accident. The court relied on the facts that (1) SFC Davis was authorized to obtain overnight accommodations in accordance with his duty in Delaware; (2) the duty in Delaware was given to SFC Davis by his employer, the United States Army; (3) SFC Davis' purpose for being in Delaware was to serve his employer by conducting training; and (4) in order for SFC Davis to satisfy this purpose, it was necessary for him to obtain overnight accommodations. Using the moment of the accident as a focal point, the court found SFC Davis' actions within the scope of employment because, at that moment, he was en route to the motel accommodations that he was authorized to obtain in accordance with his temporary duty assignment in Delaware.

Conversely, in *Cronin v. Hertz Corporation*,<sup>49</sup> the actions of the tortfeasor, Thomas Hull, a Navy civilian on temporary duty, were found to be outside of the scope of employment. Mr. Hull was stationed at Pearl Harbor, Hawaii. In August 1980, he and several other employees were assigned to temporary duty in Connecticut to attend training. Pearl Harbor personnel made lodging and rental car arrangements for the group. The travelers were to be reimbursed for their expenses on a per diem basis using United States funds.

One night during the temporary duty period, Mr. Hull took one of the rental vehicles to do some grocery shopping. After he finished shopping, he stopped at a bar and stayed for approximately four hours. After leaving the bar and while on his way back to the motel, Mr. Hull collided with a motorcycle and severely injured the rider. When he was arrested, Mr. Hull had a BAC of 1.4.

Applying Connecticut law, the District Court ruled that Mr. Hull was not acting within the scope of his employment at the time of the accident. The court rejected the argument that persons on temporary duty are always within the scope of their employment. While conceding that Mr. Hull's return to the motel was at least in part motivated by his employer's interests in getting Mr. Hull and his coworkers to training the next day, the court did not view such motivation as determinative. The court found that the risk of this type of accident was not one that could fairly be regarded as typical or incidental to Mr. Hull's employment. The court also noted that the accident did not occur within a time period which would render it within the scope of employment.

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<sup>49</sup> 818 F.2d 1064 (2d Cir. 1987).



b. Employees using their own vehicles. Ownership of the vehicle involved in an accident is only one of the many factors that must be considered in resolving the scope of employment question in vehicle accident cases. The United States may be liable in some cases involving vehicles owned by its employees. Among the factors considered to determine whether an employee driving a privately-owned vehicle is within the scope of employment are the following: (1) was the use of the privately owned vehicle authorized; (2) was the employee engaged in government business at the time of the accident; (3) did the government exercise or have the right to exercise control over them employee in the use of the vehicle; (4) did the employee deviate sufficiently from assigned duties to take him out of the scope of employment; and (5) was the employee's trip undertaken primarily for the benefit of the government, or was the trip at least as beneficial to the government as it was to the employee.<sup>50</sup>

The cases are not fully in accord as to the role played by the element of control. Some courts hold that once the master-servant relationship has been established, it is not necessary to show that the master had the right to control the details by which its directions were accomplished.<sup>51</sup> Others decline to impose liability unless control is shown.<sup>52</sup> As is true of all "scope of employment" cases, applicable state law and the

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<sup>50</sup> See RESTATEMENT, (SECOND) OF AGENCY § 239 (1958); JAYSON, HANDLING OF FEDERAL TORT CLAIMS, § 9.07[3] (1998).

<sup>51</sup> See, e.g., *Hinson v. United States*, 257 F.2d 178 (5th Cir. 1958).

<sup>52</sup> See, e.g., *James v. United States*, 467 F.2d 832 (4th Cir. 1972).

particular facts of each case will determine the outcome. Results will vary considerably from jurisdiction to jurisdiction.<sup>53</sup>

Arguably the most troublesome of the “scope of employment” cases are the “change-of-station” cases. In applying the varying laws of the applicable jurisdictions and considering the differing factual circumstances presented by each case, courts have reached divergent results. *Cooner v. United States*,<sup>54</sup> is illustrative of the problem. Although *Cooner* is an older case, it is extremely useful in that its majority and dissenting opinions highlight the factors that are typically argued on both sides of the issue.

Major Miller, an Army officer stationed at Fort Leavenworth, Kansas, received orders to report to Washington, D.C. for three days of temporary duty en route to his permanent duty station in Ottawa, Canada. MAJ Miller’s orders provided that (1) his travel was deemed necessary for his military service; (2) he was permitted to use whatever suitable mode of transportation he desired, including his own automobile; and (3) he would be reimbursed six cents per mile for the use of his own automobile.

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<sup>53</sup> For in scope cases see, e.g., *Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995); *Purcell v. United States*, 130 F. Supp. 882 (N.D. Cal. 1955 ) (Air Force officer proceeding by POV from his post to attend a staff meeting in another city was within scope. Second Circuit rejected government argument that the officer was not subject to its control at the time of the accident); *Hopper v. United States*, 122 F. Supp 181 (E.D. Tenn. 1953), *aff’d*, 214 F.2d 129 (6th Cir. 1954) (service member who, although furnished with a government car for travel, used his own car to attend a conference on recruiting activities, was within scope); *Maraquardt v. United States*, 115 F. Supp. 160 (S.D. Cal. 1953) (Corps of Engineer employee within scope while using POV to travel to a military base in connection with his work, even though the accident occurred during the first three days of the employee’s trip while he was on leave to attend his son’s graduation). For out of scope cases see, e.g., *Frazier v. Nabors*, 412 F.2d 22 (6th Cir. 1969) (Forest Service employee traveling in his own vehicle on a house hunting trip at his new duty station was not within scope); *Hall v. Green*, 8 F.3d 695 (9th Cir. 1993), *cert. denied*, 513 U.S. 809 (1994) (reservists who drove their own car off base to eat breakfast and pick up donuts for other reservists were out of scope); *Daughtery v. United States*, 427 F. Supp 222 (W.D. Pa. 1977) (driving home in POV at end of duty day not within scope); *Perez v. United States*, 368 F.2d 320 (1st Cir. 1966) (driving to post in POV at start of duty day was not within scope); *Holloway v. United States*, 829 F. Supp. 1327 (M.D. Fla. 1993), *aff’d*, 26 F.3d 1121 (11th Cir. 1994) (Naval Reserve officer driving his POV home from site of his inactive duty training was not in scope).

<sup>54</sup> 276 F.2d 220 (4th Cir. 1960).

MAJ Miller reported to his temporary duty station in Washington, D.C., where he spent three days as required. He then proceeded to Ottawa, accompanied by his family, driving his own vehicle, and using a direct route. While passing through New York, he had an accident in which he and the driver of another vehicle were killed.

Applying New York law, the majority held that MAJ Miller was acting within the scope of employment at the time of the accident. The court held that under New York law, the question of scope depended on whether MAJ Miller was operating his vehicle with the Army's consent in furtherance of its business, and not whether the details of driving were subject to the Army's control. In finding that MAJ Miller was using his vehicle in furtherance of the Army's business, and therefore acting within scope, the court relied on the following factors: (1) MAJ Miller was proceeding from one duty station to another on specific orders issued by the Army; (2) he drove on a direct route, making no detour for personal affairs; (3) the Army specifically authorized MAJ Miller's use of his own vehicle; (4) the Army was to reimburse MAJ Miller for using his vehicle; (5) he was not on leave or pass, but on what the Army termed "official travel;" (6) MAJ Miller's trip was deemed necessary for his military service by express language in the travel orders; and (7) MAJ Miller was subject to disciplinary action under the UCMJ if he drove recklessly during his trip.

The dissent, on the other hand, concluded that MAJ Miller was outside of the scope of employment at the time of the accident. It pointed out that the majority was wrong to focus on the fact that MAJ Miller's work necessitated his travel to Canada. In its view, the critical issue was the relation of MAJ Miller's personal automobile to his employment. This involved examining the right of the Army, in its role as employer, to

control the vehicle's operation during the trip. The dissent noted that although the Army may have authorized MAJ Miller's use of his private vehicle, it did not direct or otherwise assume control over the manner in which it was used. Other factors relied on by the dissent included: (1) the Army had not directed MAJ Miller to use any particular mode of travel and was indifferent to the means he chose; (2) MAJ Miller's normal duties as an Army officer did not involve driving vehicles; (3) MAJ Miller's use of his automobile was a single occurrence as opposed to regular or routine use; (4) the statement in MAJ Miller's orders that the travel was deemed necessary for his military service added nothing to the order, but was solely for MAJ Miller's benefit since it allowed him to obtain reimbursement for travel expenses; and (5) the UCMJ's proscription against reckless driving is a broad mandate that does not constitute the degree of detailed control necessary to render the United States liable under *respondeat superior* principles.

### 3. Off-duty personal activities governed by military regulations.

The Ninth Circuit has expanded the concept of scope of employment in several cases involving military regulations that encompass certain off-duty personal activities. The thrust of these cases is that the scope of employment includes performance of duties directly or indirectly associated with normal and regular military activities. Thus, where installation regulations assign responsibilities that can properly be characterized as military activities, such as safety and security functions, the matters regulated are within the scope of employment. This concept is illustrated in *Lutz v. United States*.<sup>55</sup>

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<sup>55</sup> 685 F.2d 1178 (9th Cir. 1982).

The plaintiff in *Lutz* brought suit on behalf of her two-year old daughter, who was severely injured by dog bites while residing in base housing at Malmstrom Air Force Base. Plaintiff's neighbor allowed his dog, a wolf-malamute cross named Satan, to roam free on the installation, despite a local regulation requiring residents of base housing to control and leash their pets. The plaintiff claimed that the dog's owner was negligent in failing to control the animal as required by regulations, and that the failure to observe the regulation constituted a negligent act within the scope of employment for which the United States should be liable. The District Court found that the United States was not liable, but the Ninth Circuit reversed.

The Ninth Circuit held that the regulation was a delegation to dog owners of partial responsibility for base security functions. It further found that the regulation assigned mandatory, affirmative security duty on dog owners to protect the health and safety of all base residents by controlling their animals. Because base security is a regular military function, the obligation to control a dog was held to be within the scope of the dog owner's employment, even though the lapse in control occurred during off-duty hours.

Using a similar analysis, the Ninth Circuit in *Washington v. United States*,<sup>56</sup> held that Navy service members were acting within the scope of employment when, using an open can of gasoline, they tried to prime the carburetor of an automobile located in the garage of a naval housing unit. The service members' actions violated Navy fire regulations imposed for the benefit of the Navy on personnel residing in naval housing

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<sup>56</sup> 868 F.2d 332 (9th Cir. 1989), *cert. denied*, 493 U.S. 992 (1989).

units. The fact that the service members were on liberty at the time did not relieve them of a continuing duty to comply with regulations.

Another example of this reasoning is found in *Doggett v. United States*.<sup>57</sup> In that case the Ninth Circuit held that Navy petty officers were acting within the scope of their employment when they negligently failed to prevent an enlisted member from driving while intoxicated. Applicable Navy regulations imposed a mandatory duty to detain intoxicated personnel. The court characterized the regulation as a security regulation comparable to the one at issue in *Lutz*.

Other circuit and district courts have rejected the Ninth Circuit's reasoning in these types of cases.<sup>58</sup> These courts have emphasized that "scope of employment" requires that an employee act in furtherance of his employer's interest. Duties imposed by regulations like those at issue in *Lutz*, *Washington*, and *Doggett* were not imposed by the government in its role as employer, but, rather, to enhance community life and to benefit all residents of the installation. These regulations cover ancillary matters and do not concern activities of service member "in line of duty."<sup>59</sup>

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<sup>57</sup> 875 F.2d 684 (9th Cir. 1989).

<sup>58</sup> *Stanley v. United States*, 894 F. Supp 636 (W.D.N.Y. 1995) (dog-bite case); *Chancellor v. United States*, 1 F.3d 438 (6th Cir. 1993) (dog-bite case); *Piper v. United States*, 887 F.2d 861 (8th Cir. 1989) (dog-bite case); *Nelson v. United States*, 838 F.2d 1280 (D.C. Cir. 1988) (dog-bite case).

<sup>59</sup> *Nelson v. United States*, 838 F.2d 1280 (D.C. Cir. 1988) (duty imposed on service members by base regulations to control pets was not a duty within the employer-employee relationship).

## **E. “UNDER CIRCUMSTANCES WHERE THE UNITED STATES, IF A PRIVATE PERSON, WOULD BE LIABLE”**

Early Supreme Court cases have limited litigation over this language. A claimant need not identify an identical activity by a private individual to recover from the United States. No private individual runs an Army, for example. The Supreme Court has held, however, that the statutory language “under circumstances” does not mean “under the same circumstances.”<sup>60</sup> The Court has also rejected the argument that federal government liability should be limited by principles of municipal liability, which involve difficult distinctions between “governmental” and “proprietary” functions. Such arbitrary distinctions are contrary to the intent of Congress; therefore, the government is liable for “proprietary” functions such as negligent firefighting,<sup>61</sup> and improper operation of a lighthouse.<sup>62</sup> The plaintiff must, however, prove a duty under state law. No cause of action against the government will arise unless state law would allow recovery under the circumstances.<sup>63</sup>

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<sup>60</sup> *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

<sup>61</sup> *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957).

<sup>62</sup> *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

<sup>63</sup> *Cole v. United States*, 846 F.2d 1290 (11th Cir.), *cert. denied*, 488 U.S. 966 (1988) (no liability for failure to warn when there is no similar duty under state law); *Corrigan v. United States*, 815 F.2d 954 (4th Cir.), *cert. denied*, 484 U.S. 926 (1987) (no liability for serving alcohol to drunk soldier when state law does not recognize dram shop liability).

## F. "IN ACCORDANCE WITH THE LAW OF THE PLACE WHERE THE ACT OR OMISSION OCCURRED"

The 1962 Supreme Court decision in *Richards v. United States*<sup>64</sup> clarified the proper choice of law analysis under the FTCA. In *Richards*, negligence of the Federal Aviation Administration in Oklahoma caused an airplane crash in Missouri. Missouri and Oklahoma differed on the damages recoverable in wrongful death actions. In interpreting the "law of the place where the act or omission occurred," the Court announced a two-step rule. First, consider the whole law (including choice of law principles) of the place of the negligent act. Next consider any law under that state's choice of law rules. Since Oklahoma treated the place of the injury as significant in *Richards*, the Missouri wrongful death statute applied. The outcome would have been different if Oklahoma followed a different choice of law rule.

Under the "law of the place" doctrine, the United States enjoys the benefits of all state law defenses that defeat or diminish liability. These defenses obviously apply only when a plaintiff has stated a claim that would impose liability upon a private party under similar circumstances.<sup>65</sup> Once the claimant has established the breach of state law duty, state law defenses such as limits on noneconomic damages,<sup>66</sup> recreational use statutes,<sup>67</sup>

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<sup>64</sup> 369 U.S. 1 (1962).

<sup>65</sup> *Johnson v. Sawyer*, 4 F.3d 369 (5th Cir. 1993); *Henderson v. United States*, 846 F.2d 1233 (9th Cir. 1988); *Gammill v. United States*, 727 F.2d 950 (10th Cir. 1984). See also JAYSON, HANDLING FEDERAL TORT CLAIMS, § 9.05[2][C] (1998).

<sup>66</sup> *Starns v. United States*, 923 F.2d 34 (4th Cir. 1991); *Taylor v. United States*, 821 F.2d 1428 (9th Cir. 1987), *cert. denied*, 485 U.S. 992 (1988).

<sup>67</sup> *Mansion v. United States*, 945 F.2d 1115 (9th Cir. 1991), *cert. denied*, 502 U.S. 809 (1991); *Hegg v. United States*, 817 F.2d 1328 (8th Cir. 1987).



and statutory employer laws<sup>68</sup> apply to reduce or eliminate the government's liability. Because of the pervasive nature of government regulations--especially in the military--some claimants seek to impose liability upon the government for violations of regulations.<sup>69</sup> The courts have rejected this theory unless the state tort law imposes an analogous duty on private parties.<sup>70</sup>

The courts have also applied the "law of the place" to limit government liability based on state laws of trespass,<sup>71</sup> proximate cause,<sup>72</sup> failure to warn,<sup>73</sup> and false arrest.<sup>74</sup> If there is a valid state cause of action, however, there may still be a statutory defense to the cause of action within the FTCA.

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<sup>68</sup> *Insurance Co. of N. Am. v. United States*, 643 F. Supp. 465 (M.D. Ga. 1986).

<sup>69</sup> *Nelson v. United States*, 838 F.2d 1280 (D.C. Cir. 1988); *Chancellor v. United States*, 1 F.3d 438 (6th Cir. 1993); *Piper v. United States*, 887 F.2d 861 (8th Cir. 1989).

<sup>70</sup> *Chancellor v. United States*, 1 F.3d 438 (6th Cir. 1993); *Crider v. United States*, 885 F.2d 294 (5th Cir. 1989), *cert. denied*, 495 U.S. 965 (1990) (Texas law imposes no duty on Park Rangers to restrain intoxicated driver from driving); *Doggett v. United States*, 858 F.2d 555 (9th Cir. 1988); *Chen v. United States*, 854 F.2d 622 (2d Cir. 1988); *Cecile Indus., Inc. v. United States*, 793 F.2d 97 (3d Cir. 1986); *Moody v. United States*, 774 F.2d 150 (6th Cir. 1985), *cert. denied*, 479 U.S. 814 (1986).

<sup>71</sup> *Henderson v. United States*, 846 F.2d 1233 (9th Cir. 1988).

<sup>72</sup> *Skipper v. United States*, 1 F.3d 349 (5th Cir. 1993), *cert. denied*, 510 U.S. 1178 (1993).

<sup>73</sup> *Cole v. United States*, 846 F.2d 1290 (11th Cir. 1988), *cert. denied*, 488 U.S. 966 (1988).

<sup>74</sup> *Bernard v. United States*, 25 F.3d 98 (2d Cir. 1994).

## CHAPTER V. GOVERNMENT DEFENSES

Congress has enacted thirteen specific exceptions to government liability under the FTCA.<sup>1</sup> These exceptions apply regardless of state law, and act as jurisdictional bars to suit. Whenever a statutory exception applies, the United States has left intact its sovereign immunity from suit.

### A. THE DISCRETIONARY FUNCTION EXCEPTION

Congress has refused to recognize liability “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty.”<sup>2</sup> This exception is one of the most litigated provisions of the FTCA. Legislative history concerning the exception is brief. One frequently cited passage notes that the exception was meant to preclude review of regulatory agencies like the Securities and Exchange Commission and Flood Control projects. This exception protects certain government decisions from tort challenge; matters of policy and judgment may not be challenged even if they were negligently or wrongly made. A variety of reasons, including lack of judicial expertise, undue breach of separation of powers, and harm to vital national programs, are cited as rationales for the discretionary function exception.

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<sup>1</sup> 28 U.S.C. § 2680 (1994).

<sup>2</sup> 28 U.S.C. § 2680(a) (1994).

Substantial controversy over the discretionary function exception began in the wake of the Supreme Court decision in *Dalehite v. United States*.<sup>3</sup> Over 200 million dollars in claims arose out of the explosion of two ship loads of fertilizer grade ammonium nitrate (FGAN) in the harbor at Texas City, Texas. The FGAN was produced and distributed under control of the United States agricultural aid to foreign countries. The government argued that the discretionary function exception precluded liability. Plaintiffs argued that the tortious conduct occurred not during the formulation of the foreign aid plan, but only during its execution. The Supreme Court held for the government: "Where there is room for policy judgment and decision, there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."<sup>4</sup>

*Dalehite* provided no easy test for distinguishing discretionary from nondiscretionary acts; its test sought to distinguish between immune actions at the "planning level" and non-immune actions at the "operational level."<sup>5</sup> Numerous court decisions attempted to cut into the broad government discretion recognized in *Dalehite*.<sup>6</sup>

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<sup>3</sup> 346 U.S. 15 (1953).

<sup>4</sup> *Id.* at 36.

<sup>5</sup> *Id.* at 42. See, e.g., *Kennewick Irrigation District v. United States*, 880 F.2d 1018 (9th Cir. 1989) (whether to line irrigation trench with concrete is discretionary); *Starrett v. United States*, 847 F.2d 539 (9th Cir. 1988) (failure to develop SOP to preclude ground water pollution from demil operation is operational decision not barred by § 2680(a)); *Allen v. United States*, 816 F.2d 1417 (10th Cir. 1987), *cert. denied*, 484 U.S. 1004 (1987) (despite negligence in planning and conducting Nevada Atomic tests, cancer suits barred by § 2680(a)).

<sup>6</sup> *Moyer v. Marin Marietta Corp.*, 481 F.2d 585 (5th Cir. 1973); *Seaboard Corp. Coastline R.R. v. United States*, 473 F.2d 714 (5th Cir. 1973); *American Exchange Bank of Madison v. United States*, 257 F.2d 938 (7th Cir. 1958).

Recently, however, the Supreme Court has simplified--and broadened--application of the discretionary function exception.

In *United States v. Varig Airlines*,<sup>7</sup> and *United States v. Gaubert*,<sup>8</sup> the Court discarded the “operational/planning” level distinction in favor of a new test based on the type of conduct involved. In *Varig Airlines* the Court applied the exception to bar claims based upon the FAA’s alleged negligent inspection of commercial aircraft before issuing certifications. The Court noted that it was “unnecessary--and indeed impossible--to define with precision every contour of the discretionary function exception.”<sup>9</sup> In an apparent attempt to disassociate itself from the “operational vs. planning level” litmus test developed by the lower courts after *Dalehite*, the Court stated that it was the “nature of the conduct, rather than the status of the actor” that determines whether the discretionary function will apply. The Court reemphasized this test in *Gaubert* when the plaintiff, the president of the savings and loan, alleged that the federal regulators caused him personally to lose over \$100 million. The Court found that the exception barred all claims against federal officials who seized and operated a savings and loan.

Encompassed in the discretionary function “conduct” test are certainly the discretionary acts of government agencies acting as regulators of the conduct of private individuals. For the acts of individual employees, the basic analytical approach is “whether the challenged acts of a government employee--whatever his or her rank--are of the nature and quality that Congress intended to shield from tort liability.” This expanded

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<sup>7</sup> 467 U.S. 797 (1984).

<sup>8</sup> 499 U.S. 315 (1991).

coverage of the discretionary function exception echoes the statement from *Dalehite* that “where there is room for policy judgment and decision, there is discretion [and] it necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.”<sup>10</sup>

Under the “conduct” test, courts have dismissed suits alleging failure of federal officials to publicize available programs,<sup>11</sup> to supervise proper disposal of water contaminants,<sup>12</sup> to provide adequate police protection after an “invasion,”<sup>13</sup> to warn of death threats by a probationer,<sup>14</sup> and to operate properly failed saving and loan associations.<sup>15</sup> Many, if not all, of these suits would have been allowed under the *Dalehite* operational level analysis.

Several conclusions may be drawn from the many discretionary function cases decided over the years. First, the courts generally find the exception inapplicable, with certain exceptions, to cases sounding in automobile tort,<sup>16</sup> medical malpractice,<sup>17</sup> and pilot

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<sup>9</sup> *Id.*

<sup>10</sup> *Dalehite v. United States*, 346 U.S. 15, 36 (1953).

<sup>11</sup> *Powers v. United States*, 996 F.2d 1121 (11th Cir. 1993).

<sup>12</sup> *Kirchman v. United States*, 8 F.3d 1273 (8th Cir. 1993).

<sup>13</sup> *Industria Panificadora v. United States*, 957 F.2d 886 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 908 (1992).

<sup>14</sup> *Weissich v. United States*, 4 F.3d 810 (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994).

<sup>15</sup> *See, e.g., McNeily v. United States*, 6 F.3d 343 (5th Cir. 1993).

<sup>16</sup> *Crouse v. United States*, 137 F. Supp. 47 (D. Del. 1955); *Sullivan v. United States*, 129 F. Supp. 713 (N.D. Ill. 1955).

<sup>17</sup> *Baie v. Secretary of Defense*, 784 F.2d 1375 (9th Cir. 1986), *cert. denied*, 479 U.S. 823 (1986) (CHAMPUS regulation barring payment for penile insert falls under discretionary function); *Supchak v. United States*, 365 F.2d 844 (3d Cir. 1966); *White v. United States*, 317 F.2d 14 (4th Cir. 1963), *aff'd*, 359

or controller negligence in aircraft crashes.<sup>18</sup> By contrast, however, the exception applies to most cases involving federal regulatory agency actions,<sup>19</sup> and cases involving uniquely military activities.<sup>20</sup> A statute or regulation expressly vesting discretion in the decision maker will usually result in application of the discretionary function exception.<sup>21</sup> Government compliance with mandatory language of a statute or regulation will also normally protect the government.<sup>22</sup> By contrast, the government will often be held liable when a federal employee has violated a mandatory provision of law or regulation.<sup>23</sup>

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F.2d 989 (4th Cir. 1966); *United States v. Gray*, 199 F.2d 239 (10th Cir. 1952); *Denny v. United States*, 171 F.2d 365 (5th Cir. 1949), *cert. denied*, 337 U.S. 919 (1949).

<sup>18</sup> *Hertz v. United States*, 387 F.2d 870 (5th Cir. 1969); *United States v. Furumizo*, 381 F.2d 965 (9th Cir. 1967); *Ingham v. Eastern Airlines Inc.*, 373 F.2d 227 (2d Cir. 1967), *cert. denied*, 389 U.S. 931 (1967); *United Airlines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964); *Kullberg v. United States*, 271 F. Supp. 788 (W.D. Pa. 1964).

<sup>19</sup> *Bowman v. United States*, 820 F.2d 1393 (4th Cir. 1987) (decision not to place guard rails on Blue Ridge Parkway falls under § 2680(a)); *Blaber v. United States*, 332 F.2d 629 (2d Cir. 1964); *United States v. Morrell*, 331 F.2d 498 (10th Cir. 1964), *cert. denied*, 379 U.S. 879 (1964); *Weinstein v. United States*, 244 F.2d 68 (3d Cir. 1957), *cert. denied*, 355 U.S. 868 (1957).

<sup>20</sup> *Blakely v. U.S.S. Iowa*, 780 F. Supp. 350 (E.D. Va. 1991), *aff'd*, 991 F.2d 148 (4th Cir. 1993) (holding conduct of Navy investigation within exception); *Ayer v. United States*, 902 F.2d 1038 (1st Cir. 1990) (design of missile capsule discretionary--need not be made safe for visitors); *United States v. Faneca*, 332 F.2d 872 (5th Cir. 1964), *cert. denied*, 380 U.S. 971 (1965); *Barroll v. United States*, 135 F. Supp. 441 (D. Md. 1955); *Bartholomae v. United States*, 135 F. Supp. 651 (S.D. Cal. 1955), *aff'd on other grounds*, 253 F.2d 716 (9th Cir. 1957).

<sup>21</sup> *Layton v. United States*, 984 F.2d 1496 (8th Cir. 1993) *cert. denied*, 510 U.S. 877 (1993) (control of federal parks within discretion of park rangers); *Arizona Maintenance Co. v. United States*, 864 F.2d 1497 (9th Cir. 1989) (seismic blasting by Dept. of Interior must conform to industry standard); *Dupree v. United States*, 247 F.2d 819 (3d Cir. 1957); *Schmidt v. United States*, 198 F.2d 32 (7th Cir. 1952).

<sup>22</sup> *Weinstein v. United States*, 244 F.2d 68 (3d Cir. 1957), *cert. denied*, 355 U.S. 868 (1957); *Schmidt v. United States*, 198 F.2d 32 (7th Cir. 1952), *cert. denied*, 344 U.S. 896 (1952).

<sup>23</sup> *Berkovitz v. United States*, 486 U.S. 531 (1988) (discretionary function does not apply when polio vaccine released without government mandated testing); *Summers v. United States*, 905 F.2d 1212 (9th Cir. 1990) (National Forest Services procedures requiring safety not followed on beach fires and warning of their dangers--discretionary function bar unavailable); *Dons v. United States*, 522 F.2d 990 (6th Cir. 1975); *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974); *United Airlines, Inc. v. Wiener*, 335 F.2d 379 (9th Cir. 1964), *cert. denied*, 379 U.S. 951 (1964).

## B. INTENTIONAL TORTS

One important exception in 28 U.S.C. § 2680 excludes intentional torts, for those claims “arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.”<sup>24</sup> A common argument in cases based on intentional tort is that some antecedent negligence was the proximate cause of the injury.<sup>25</sup> A plaintiff, for example, will plead facts alleging that the bodily contact was unintentional or, if it was intentional, simply a consequence of some antecedent negligence.

The courts have generally looked to the underlying basis of the cause of action instead of relying solely on the pleadings in these cases. Actions alleging negligent supervision of a government employee have become common when the claimant is injured by an intentional act.<sup>26</sup> The Supreme Court resolved a conflict among the circuits in these cases in 1988.

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<sup>24</sup> 28 U.S.C. § 2680(h) (1994).

<sup>25</sup> See, e.g., *Hoels v. United States*, 629 F.2d 586 (9th Cir. 1980); *Gibson v. United States*, 457 F.2d 1391 (3d Cir. 1972).

<sup>26</sup> *Sheehan v. United States*, 896 F.2d 1168 (9th Cir. 1990) (sexual assault by fellow employee not barred--supervisor should have intervened); *Gay v. United States*, 739 F. Supp 275 (D. Md. 1990) (no negligent hiring or training of health care worker who commits indecent assault on Navy patient); *Guccione v. United States*, 878 F.2d 32 (2d Cir. 1989), *cert. denied*, 493 U.S. 1020 (1990) (negligent supervision not applicable to assault by FBI undercover agent); *Morrill v. United States*, 821 F.2d 1426 (9th Cir. 1987) (exception does not bar claim for negligent supervision in rape of “go-go” dancer in EM club); *Doe v. United States*, 838 F.2d 220 (7th Cir. 1988) (duty to protect day care center children precludes application of exception in sexual molestation case); *Hughes v. United States*, 662 F.2d 219 (4th Cir. 1981); *Naisbitt v. United States*, 611 F.2d 1350 (10th Cir. 1980), *cert. denied*, 449 U.S. 885 (1980); *Lambertson v. United States*, 528 F.2d 441 (2d Cir. 1976), *cert. denied*, 426 U.S. 921 (1976); *Bates v. United States*, 517 F. Supp. 1350 (W.D. Mo. 1980), *aff’d*, 701 F.2d 737 (8th Cir. 1983); *Coffey v. United States*, 387 F. Supp. 539 (D. Conn. 1975).

**Sheridan v. United States**

**487 U.S. 392 (1988)**

Justice Stevens delivered the opinion of the Court.

On February 6, 1982, an obviously intoxicated off-duty serviceman named Carr fired several rifle shots into an automobile being driven by petitioners on a public street near the Bethesda Naval Hospital. Petitioners brought suit against the United States alleging that their injuries were caused by the government's negligence in allowing Carr to leave the hospital with a loaded rifle in his possession. The District Court dismissed the action--and the Court of Appeals affirmed--on the ground that the claim is barred by the intentional tort exception to the Federal Tort Claims Act (FTCA). The question we granted certiorari to decide is whether petitioners' claim is one "arising out of" an assault or battery within the meaning of 28 U.S.C. § 2680(h).

**I**

When it granted the government's motion to dismiss, the District Court accepted the petitioners' version of the facts as alleged in their complaint and as supplemented by discovery. That version may be briefly stated. After finishing his shift as a naval medical aide at the hospital, Carr consumed a large quantity of wine, rum, and other alcoholic beverages. He then packed some of his belongings, including a rifle and ammunition, into a uniform bag and left his quarters. Some time later,



three naval corpsmen found him lying face down in a drunken stupor on the concrete floor of a hospital building. They attempted to take him to the emergency room, but he broke away, grabbing the bag and revealing the barrel of the rifle. At the sight of the rifle barrel, the corpsmen fled. They neither took further action to subdue Carr, nor alerted the appropriate authorities that he was heavily intoxicated and brandishing a weapon. Later that evening, Carr fired the shots that caused physical injury to one of the petitioners, and property damage to their car.

The District Court began its legal analysis by noting the general rule that the government is not liable for the intentional torts of its employees. The petitioners argued that the general rule was inapplicable because they were relying, not on the fact that Carr was a government employee when he assaulted them, but rather on the negligence of the other government employees who failed to prevent his use of the rifle. The District Court assumed that the alleged negligence would have made the defendant liable under the law of Maryland, and also assumed that the government would have been liable if Carr had not been a government employee. Nevertheless, although stating that it was “sympathetic” to petitioners’ claim, App. to Pet. for Cert. 26a, it concluded that Fourth Circuit precedents required dismissal because Carr “happens to be a government employee rather than a private citizen,” *Id.* at 23a.

The Court of Appeal affirmed. Like the District Court, it concluded that the Circuit’s prior decisions in *Hughes v. United States*,

662 F.2d 219 (CA4 1981) (*per curiam*), and *Thigpen v. United States*, 800 F.2d 393 (CA4 1986) foreclosed the following argument advanced by petitioners:

The Sheridans also argue that Carr's status as an enlisted naval man and, therefore, a government employee, should [be] irrelevant to the issue of government liability *vel non* from liability for negligently failing to prevent the injury. They correctly assert that the shooting at the Sheridan's vehicle was not connected with Carr's job responsibility or duties as a government employee. The Sheridans further assert that if Carr had not been a government employee, a claim would undoubtedly lie against the government and § 2680(h) would be inapplicable. *See Rogers v. United States*, 397 F.2d 12 (4th Cir. 1968) (holding § 2680(h) inapplicable where probationer alleged that negligence by United States marshal allowed nongovernment employee to assault and torture probationers). They contend it is anomalous to deny their claim simply because the corpsmen were negligent in the handling of a government employee rather than a private citizen. 823 F.2d, at 822 (footnotes omitted).

In dissent, Chief Judge Winter argued that cases involving alleged negligence in hiring or supervising government employees are not

applicable to a situation in which the basis for the government's alleged liability has nothing to do with the assailant's employment status. He wrote:

As the majority opinion concedes . . . , *Hughes* and *Thigpen*, as well as other cases relied upon by the majority . . . , are all cases where the purported government negligence was premised solely on claims of negligent hiring and/or supervision. The same was true in *United States v. Shearer*, [473 U.S. 52, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985)]. Such claims are essentially grounded in the doctrine of respondeat superior. In these cases, the government's liability arises, if at all, only because of the employment relationship. If the assailant were not a federal employee, there would be no independent basis for a suit against the government. It is in this situation that an allegation of government negligence can legitimately be seen as an effort to 'circumvent' the § 2680(h) bar; it is just this situation--where government liability is possible only because of the fortuity that the assailant happens to receive federal paychecks--that § 2680(h) was designed to preclude. See *Shearer*, [473 U.S., at 54-57, 105 S.Ct., at 3041-3043]; *Hughes [v. Sullivan]*, 514 F. Supp. [667], at

668' 669-70 [D.C. Va. 1980]; *Panella v. United States*, 216 F.2d 622, 624 (2d Cir. 1954).

On the other hand, where government liability is independent of the assailant's employment status, it is possible to discern two distinct torts: the intentional tort (assault and battery) and the government negligence that precipitated it. Where no reliance is placed on negligent supervision or respondeat superior principles, the cause of action against the government cannot really be said to 'arise out of' the assault and battery; rather it is based on the government's breach of a separate legal duty. 823 F.2d at 824 (footnote omitted).

The difference between the majority and the dissent in this case is reflected in conflicting decision among the Circuits as well. We therefore granted certiorari to resolve this important conflict. 484 U.S. 1024 (1988).

## II

The Federal Tort Claims Act gives Federal District Courts jurisdiction over claims against the United States for money damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or

omission occurred.” 28 U.S.C. § 1346(b). However, among other limitations, the Act also provides that this broad grant of jurisdiction “shall not apply to . . . [a]ny claim arising out of assault, battery,” or other specified intentional torts. 28 U.S.C. § 2680(h).

The words “any claim arising out of” an assault or battery are unquestionably broad enough to bar all claims based entirely on assault or battery. The import of these words is less clear, however, when they are applied to a claim arising out of two tortious acts, one of which is an assault or battery and the other of which is a mere act of negligence. Nonetheless, it is both settled and undisputed that in at least some situations the fact that an injury was directly caused by an assault or battery will not preclude liability against the government for negligently allowing the assault to occur. Thus, in *United States v. Muniz*, 374 U.S. 50, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963), we held that a prisoner who was assaulted by other inmates could recover damages from the United States because prison officials were negligent in failing to prevent the assault that caused his injury.

Two quite different theories might explain why Muniz’ claim did not “arise out of” the assault that caused his injuries. First, it might be assumed that since he alleged an independent basis for tort liability--namely, the negligence of the prison officials--the claim did not arise solely, or even predominantly, out of the assault. Rather the attention of the trier of fact is focused on the government’s negligent act or omission;

the intentional commission is simply considered as part of the causal link leading to the injury. Under this view, the assailant's individual involvement would not give rise to government liability, but antecedent negligence by government agents could, provided of course that similar negligent conduct would support recovery under the law of the State where the incident occurred. See Note, Section 2680(h) of the Federal Tort Claims Act; Government Liability for the Negligent Failure to Prevent an Assault and Battery by a Federal Employee, 69 Geo.L.J. 803, 922-825 (1981) (advocating this view and collecting cases).

In response to this theory, the Government argues that the "arising out of" language must be read broadly and that the Sheridans' negligence claim is accordingly barred, for in the absence of Carr's assault, there would be no claim. We need not resolve this dispute, however, because even accepting the Government's contention that when an intentional tort is a *sine qua non* of recovery the action "arises out of" that tort, we conclude that the exception does not bar recovery in this case. We thus rely exclusively on the second theory, which makes clear that the intentional tort exception is simply inapplicable to torts that fall outside the scope of § 1346(b)'s general waiver.

This second exception for the *Muniz* holding, which is narrower but not necessarily inconsistent with the first, adopts Judge (later Justice) Harlan's reasoning in *Panella v. United States*. 216 F.2d 622 (CA2 1954). In that case, as in *Muniz*, a prisoner claimed that an assault by another

inmate had been caused by the negligence of federal employees. After recognizing that the “immunity against claims arising out of assault and battery can literally be read to apply to assaults committed by persons other than government employees,” *Id.* 216 F.2d, at 624, his opinion concluded that § 2680(h) must be read against the rest of the Act. This exception should therefore be construed to apply only to claims that would otherwise be authorized by the basic waiver of sovereign immunity. Since an assault by a person who was not employed by the government could not provide the basis for a claim under the FTCA, the exception could not apply to such an assault; rather, the exception only applies in cases arising out of assaults by federal employees.

In describing the coverage of the FTCA, Judge Harlan emphasized the statutory language that was critical to his analysis. As he explained, the Act covers actions for personal injuries “caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . (Italics supplied).” *Id.*, at 623. We need only move the emphasis to the next phrase--“while acting within the scope of his office or employment”--to apply his analysis to the assault and battery committed by the off-duty, inebriated enlisted man in the case. If nothing more was involved here than the conduct of Carr at the time he shot at petitioners, there would be no basis for imposing liability on the government. The tortious conduct of an off-duty serviceman, not acting within the scope of his office or employment, does

not in itself give rise to government liability whether that conduct is intentional or merely negligent.

As alleged in this case, however, the negligence of other government employees who allowed a foreseeable assault and battery to occur may furnish a basis for government liability that is entirely independent of Carr's employment status. By voluntarily adopting regulations that prohibit the possession of firearms on the naval base and that require all personnel to report the presence of any such firearm, and by further voluntarily undertaking to provide care to a person who was visibly drunk and visibly armed, the government assumed responsibility to "perform [its] 'good Samaritan' task in a careful manner." *Indian Towing Co. v. United States*, 350 U.S. 61, 65, 76 S.Ct. 122, 124, 100 L.Ed. 48 (1955). The District Court and the Court of Appeals both assumed that petitioners' version of the facts would support recovery under Maryland law on a negligence theory if the naval hospital had been owned and operated by a private person. Although the government now disputes this assumption, it is not our practice to reexamine a question of state law of that kind, or without good reason, to pass upon it in the first instance. *See Cort v. Ash*, 422 U.S. 66, 73, n.6, 95 S.Ct. 2080, 2085-2086, n.6, 45 L.Ed.2d. 26 (1975). On this assumption, it seems perfectly clear that the mere fact that Carr happened to be an off-duty federal employee should not provide a basis for protecting the government from liability that would attach if Carr had been an unemployed civilian patient or visitor in the



hospital. Indeed, in a case in which the employment status of the assailant has nothing to do with the basis for imposing liability on the government, it would seem perverse to exonerate the government because of the happenstance that Carr was on a federal payroll.

In a case of this kind, the fact that Carr's behavior is characterized as an intentional assault rather than a negligent act is also quite irrelevant. If the government has a duty to prevent a foreseeably dangerous individual from wandering about unattended it would be odd to assume that Congress intended a breach of that duty to give rise to liability when the dangerous human instrument was merely negligent but not when he or she was malicious. In fact, the human characteristics of the dangerous instrument are also beside the point. For the theory of liability in this case is analogous to cases in which a person assumes control of a vicious animal, or perhaps an explosive devise. *Cf. Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). Because neither Carr's employment status nor his state of mind has any bearing on the basis for petitioner's claim for money damages, intentional tort exception to the FTCA is not applicable in this case.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Criticism of the government's immunity for acts of law enforcement officers led to amendment of the FTCA on 16 March 1974. The amendment made the United States liable for the conduct of "investigative or law enforcement officers of the United States" in claims arising out of "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution."<sup>27</sup> The new law defines "investigative or law enforcement officers" as officers "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." A significant issue for the military is the scope of the term "law enforcement officer." Even though they do not possess general power to "make arrests for violations of Federal law," military police have been held to be "law enforcement officers of the United States."<sup>28</sup> Post exchange detectives and security guards, although within the definitions of employees of the government, are not federal law enforcement officers within the meaning of the FTCA exception.<sup>29</sup>

Another portion of the intentional tort exception that has generated controversy and, consequently, a morass of litigation, is the misrepresentation provision.<sup>30</sup> This

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<sup>27</sup> 28 U.S.C. § 2680(h) (1994).

<sup>28</sup> *Kennedy v. United States*, 585 F. Supp. 1119 (D.S.C. 1984).

<sup>29</sup> *Solomon v. United States*, 559 F.2d 309 (5th Cir. 1977), *reh'g denied*, 564 F.2d 98 (5th Cir. 1977).

<sup>30</sup> *United States v. Neustadt*, 366 U.S. 696 (1961); *Jones v. United States*, 207 F.2d 563 (2d Cir. 1952), *cert. denied*, 374 U.S. 921 (1954).

provision encompasses both negligent and intentional misrepresentations. The issue, again, revolves around the distinction between negligent conduct and negligent misrepresentation.<sup>31</sup> The exception applies whenever the alleged negligent act is the making of a false representation.<sup>32</sup> Misrepresentation by omission may, however, be actionable; for example, the weather bureau's negligent failure to give a hurricane warning.<sup>33</sup> Failure to warn of navigational hazards in aircraft cases has been treated as operational negligence and not a misrepresentation.<sup>34</sup> Misdiagnoses in medical malpractice cases are also not considered misrepresentations.<sup>35</sup>

Another clause of the intentional tort exception often invoked by the military is the contract interference clause. This exception bars tort claims arising out of employment contracts or enlisted agreement disputes,<sup>36</sup> but its scope can be limited by the specific facts of a suit.<sup>37</sup>

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<sup>31</sup> Compare *United States v. Neustadt*, 366 U.S. 696 (1961), with *Block v. Neal*, 460 U.S. 289 (1983).

<sup>32</sup> *Redmond v. United States*, 518 F.2d 811 (7th Cir. 1975); *Fitch v. United States*, 513 F.2d 1013 (6th Cir. 1975), *cert. denied*, 423 U.S. 866 (1975); *Matthews v. United States*, 456 F.2d 395 (5th Cir. 1972); *Reamer v. United States*, 459 F.2d 709 (4th Cir. 1972); *Saxton v. United States*, 456 F.2d 1105 (8th Cir. 1972); *Hall v. United States*, 274 F.2d 69 (10th Cir. 1959); *Clark v. United States*, 218 F.2d 446 (9th Cir. 1954).

<sup>33</sup> *Barite v. United States*, 216 F. Supp. 10 (W.D. La. 1963) *aff'd* 326 F.2d 754 (5th Cir. 1964), *cert. denied*, 379 U.S. 852 (1964).

<sup>34</sup> *United Airlines, Inc., v. Wiener*, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964); *Wenzel v. United States*, 419 F.2d 260 (3d Cir. 1969).

<sup>35</sup> *Ramirez v. United States*, 567 F.2d 854 (9th Cir. 1977); *Beech v. United States*, 345 F.2d 872 (5th Cir. 1965).

<sup>36</sup> *Young v. United States*, 498 F.2d 1211 (5th Cir. 1974); *Reamer v. United States*, 459 F.2d 709 (4th Cir. 1972); *Small v. United States*, 333 F.2d 702 (3d Cir. 1964); *Forrester v. United States*, 443 F. Supp. 115 (S.D.N.Y. 1978); *Black v. Sheraton Corp. of America*, 564 F.2d 531 (D.C. Cir. 1977); *Fletcher v. VA*, 103 F. Supp. 654 (E.D. Mich. 1952).

<sup>37</sup> See, e.g., *Mundy v. United States*, 983 F.2d 950 (9th Cir. 1993) (exception does not apply to firing by defense contractor due to withdrawal of security clearance due to FBI misfiling documents).

Although the scope of the intentional tort exception is broad, it does not, however, bar liability of all intentional torts. Several Circuit Courts have allowed suits based on the intentional infliction of emotional distress because it is not one of the specifically enumerated exceptions within the statute.<sup>38</sup> This intentional tort exception generally will apply only if the conduct relied upon to establish the alleged tort is substantially the same as that required to establish one of the specifically barred torts.<sup>39</sup>

## C. DETENTION OF PROPERTY

No claim under the FTCA arises from the detention of any property by a customs, excise, or law enforcement officer.<sup>40</sup> The language of this exclusion bars claims by both the owner of the detained property and claims in favor of other persons with lesser interests, such as lien holders.<sup>41</sup> Courts have narrowly construed this exception to fit its proper purpose: to preclude law suits which might frustrate vigorous customs and law enforcement. A claim that goods “mysteriously disappeared” from a customs warehouse,

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<sup>38</sup> *Truman v. United States*, 26 F.3d 592 (5th Cir. 1994); *Santiago-Ramirez v. Dep’t of Defense*, 984 F.2d 16 (1st Cir. 1993); *Kohn v. United States*, 680 F.2d 922 (2d Cir. 1982), *aff’d*, 760 F.2d 253 (1985); *Gross v. United States*, 676 F.2d 295 (8th Cir. 1982); *Sheehan v. United States*, 896 F.2d 1168 (9th Cir. 1990) *modified*, 917 F.2d 424 (9th Cir. 1990).

<sup>39</sup> *Sheehan v. United States*, 896 F.2d 1168, *modified*, 917 F.2d 424 (9th Cir. 1990).

<sup>40</sup> 28 U.S.C. § 2680(c) (1994).

<sup>41</sup> *Menkarell v. Bureau of Narcotics*, 463 F.2d 88 (3d Cir. 1972); *United States v. One 1951 Cadillac Coupe De Ville*, 125 F. Supp. 661 (E.D. Mo. 1954).

therefore, states a valid claim.<sup>42</sup> Money held and lost by the immigration and naturalization service is, however, covered by the exception.<sup>43</sup>

## D. COMBATANT ACTIVITIES

The FTCA bars “any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”<sup>44</sup> The “combat activities” language refers to activities closely incident to actual engagement; a formal declaration of war is not required.<sup>45</sup> Training to develop combat skills or other military activity is not within the exception, whether it takes place in peace or in wartime.<sup>46</sup> Quite often the foreign country exception<sup>47</sup> and the incident to service rule will also bar a claim arising out of a combat situation.

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<sup>42</sup> *Alliance Assurance Co. v. United States*, 146 F. Supp. 118 (S.D.N.Y. 1956), *rev'd on other grounds*, 252 F.2d 529 (2d Cir. 1958). *See also* *Otten v. United States*, 210 F. Supp. 729 (S.D.N.Y. 1962) (official not acting in his capacity as customs, excise, or law enforcement officer).

<sup>43</sup> *Halverson v. United States*, 972 F.2d 654 (5th Cir. 1992), *cert. denied*, 507 U.S. 925 (1993); *see also* *Cheney v. United States*, 972 F.2d 247 (8th Cir. 1992) (turning over title of POV to third party who obtains POV from storage warehouse where placed by arrested person falls under exception).

<sup>44</sup> 28 U.S.C. § 2680(j) (1994).

<sup>45</sup> *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992), *cert. denied*, 508 U.S. 960 (1993) (shooting down of Iranian airliner by Navy near Kuwait in July 1988 falls under exception); *Rotko v. Abrams*, 338 F. Supp. 46 (D. Conn. 1971), *aff'd*, 455 F.2d 992 (1972); *Morrison v. United States*, 316 F. Supp. 78 (M.D. Ga. 1970).

<sup>46</sup> *Johnson v. United States*, 170 F.2d 767 (9th Cir. 1948); *Skeels v. United States*, 72 F. Supp. 372 (W.D. La. 1947).

<sup>47</sup> 28 U.S.C. § 2680(k) (1994).

## E. FOREIGN COUNTRY CLAIMS

The United States has not waived its immunity from suit for claims arising in a “foreign country.”<sup>48</sup> The exception applies regardless of the citizenship of the claimant. The dependent of a U.S. service member in Germany must, therefore, resort to other claims statutes to redress government negligence.<sup>49</sup>

A “foreign country” is any land area outside of the control of the United States. The Supreme Court clarified the scope of the exception in 1993 when it applied the foreign country exception to bar the FTCA suit by the widow of a construction worker killed in Antarctica.<sup>50</sup> The Court considered, but rejected, the argument that the exception did not apply to claims arising in Antarctica because there is no sovereign government there. Similar cases have denied FTCA recovery for incidents occurring in United Nations trusteeships,<sup>51</sup> air space over foreign countries,<sup>52</sup> or on the grounds of an American embassy abroad.<sup>53</sup> The foreign country exception does not, however, bar torts occurring on the high seas or in aircraft flying over the high seas.<sup>54</sup> The exception also

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<sup>48</sup> 28 U.S.C. § 2680(k) (1994).

<sup>49</sup> The Military Claims Act, 10 U.S.C. §2733, may be used in these situations.

<sup>50</sup> *Smith v. United States*, 507 U.S. 197 (1993).

<sup>51</sup> *Callas v. United States*, 253 F.2d 838 (2d Cir. 1958), *cert. denied*, 357 U.S. 96 (1958).

<sup>52</sup> *Pignataro v. United States*, 172 F. Supp. 151 (E.D.N.Y. 1959).

<sup>53</sup> *Meredith v. United States*, 330 F.2d 9 (9th Cir. 1964), *cert. denied*, 379 U.S. 867 (1964).

<sup>54</sup> *Blumenthal v. United States*, 306 F.2d 16 (3d Cir. 1962). Maritime statutes will usually govern the resolution of the claim in these situations. The suits in the Admiralty Act, 46 U.S.C. §§ 741-752, and the Public Vessel Act, 46 U.S.C. §§ 781-790, are the statutes commonly used. *See Executive Jet v. Cleveland*, 409 U.S. 249 (1972) (requiring a “significant relationship to traditional maritime activity” in maritime suits).

does not apply when the negligence occurs in the United States but has its effect in a foreign country.<sup>55</sup>

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<sup>55</sup> Leaf v. United States, 588 F.2d 733 (9th Cir. 1978); *In re Paris Air Crash*, 399 F. Supp. 732 (C.D. Calif. 1975).

## **APPENDIX A – 28 U.S.C. § 1346(b)**

### **UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART IV--JURISDICTION AND VENUE CHAPTER 85--DISTRICT COURTS; JURISDICTION**

§ 1346(b). United States as defendant

**(b)(1)** Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

**(2)** No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.



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# **APPENDIX B – THE FEDERAL TORT CLAIMS ACT**

## **28 U.S.C. §§ 2671-2680**

### **UNITED STATES CODE ANNOTATED TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE PART VI--PARTICULAR PROCEEDINGS CHAPTER 171--TORT CLAIMS PROCEDURE**

#### **§ 2671. Definitions**

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

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§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of \$25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of \$2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of \$2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

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§ 2673. Reports to Congress

The head of each federal agency shall report annually to Congress all claims paid by it under section 2672 of this title, stating the name of each claimant, the amount claimed, the amount awarded, and a brief description of the claim.

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§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

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§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

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§ 2676. Judgment as bar

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

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**§ 2677. Compromise**

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.



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§ 2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than \$2,000 or imprisoned not more than one year, or both.

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§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government--

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if--

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

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§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

[(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.]

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation

of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.